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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SUSAN E. DAVIDSON,
Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

Appeal From The Supreme Court of Illinois

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether a state court rule permitting mid-trial appeals of evidentiary rulings by the State in criminal cases after jeopardy has attached and over a defendant's objection, followed by a second trial of the same defendant for the same offense, is repugnant to the double jeopardy clause.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	v
Introduction	1
Opinions Below	1
Jurisdiction	3
Statement Of The Case	7
The Question Is Substantial	10
Conclusion	14
Proof of Service	15
Appendices:	
1. *People v. Davidson* (1983) 116 Ill. App. 3d 164, 71 Ill. Dec. 824, 451 N.E. 2d 978	A1
2. Leave to appeal denial, Illinois Supreme Court	A14
3. Motion to dismiss, trial court	A15
4. Order denying motion to dismiss, trial court	A19
5. Order dismissing appeal, Appellate Court	A20
6. Leave to appeal denial, Illinois Supreme Court	A23
7. Order denying rehearing	A24
Order denying certification that federal constitutional question had been considered and denied	A24

8. Notice of appeal, United States Supreme Court A25

9. Partial report of proceedings, motion to dismiss in trial court A27

10. Partial trial transcript, mistrial over defendant's objection A32

11. From Appellant's first state appellate court brief A33

12. Constitutional and statutory provisions:

A. 28 *United States Code* §1257(2) A35

B. 28 *United States Code* §1257(3) A35

C. 28 *United States Code* §2106 ..... A35

D. 5th Amendment, *Constitution of the United States* *A36*

E. 14th Amendment, *Constitution of the United States* *A36*

F. *Illinois Revised Statutes,* Chapter 110A, §604(a)(1) A37

G. *Illinois Revised Statutes,* Chapter 110A, §604(f) A37

H. *Illinois Revised Statutes,* Chapter 110A, §315 ..... A37

I. *Illinois Revised Statutes,* Chapter 38, §114-12 ..... A38

TABLE OF AUTHORITIES

Page

Cases:

Abney v. United States (1977) 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 5

American Railway Express Co. v. Levee (1923) 263 U.S. 19, 20-21, 44 S.Ct. 11 5

Arizona v. Washington (1978) 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 .....10, 12, 13

Benton v. Maryland (1969) 395 U.S. 784, 89 S.Ct. 2056, 2062 ..... 4, 10

Cox Broadcasting Corp. v. Cohn (1975) 420 U.S. 469, 95 S.Ct. 1029, 1038, 43 L.Ed.2d 328 4

Crist v. Bretz (1978) 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 ..... 7, 10

Downum v. United States (1963) 372 U.S. 735, 83 S.Ct. 1033 12

Finch v. United States (1977) 433 U.S. 676, 97 S.Ct. 2909, 53 L.Ed.2d 1048 ..... 10, 11

Fong Foo v. United States (1962) 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629 ..... 11, 12

Great Western Tel. Co. v. Burnham (1896) 162 U.S. 339, 16 S.Ct. 850 6

Green v. United States (1957) 355 U.S. 184, 78 S.Ct. 221 10, 11

Harris v. Washington (1971) 404 U.S. 55, 92 S.Ct. 183, 30 L.Ed.2d 212 4

Illinois v. Sommerville (1973) 410 U.S. 458, 461-63, 93 S.Ct. 1066, 35 L.Ed.2d 425 12

In re Griffiths (1973) 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 4

Largent v. Texas (1943) 318 U.S. 418, 63 S.Ct. 667 6

Lathrop v. Donohue (1961) 367 U.S. 820, 81 S.Ct. 1826 4

Lawrence v. State Tax Commissioner (1932) 286 U.S. 276, 52 S.Ct. 556 6

Mayer v. Chicago (1971) 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 4

Minneapolis, St. P. and S. S. M. Ry. Co. v. Rock (1929) 279 U.S. 410, 49 S.Ct. 363 5

People v. Davidson (1983) 116 Ill.App.3d 164, 71 Ill. Dec. 824, 451 N.E.2d 978 .....7, 8, 9, 10, 11, 12, 13

People v. Flatt (1980) 82 Ill. 2d 250, 45 Ill. Dec. 158, 412 N.E.2d 509 6

People v. Grod (1944) 385 Ill. 584, 53 N.E.2d 591, 595 .. 4

People v. Johnson (1983) 113 Ill.App.3d 367, 69 Ill. Dec. 285, 447 N.E.2d 502 12

People ex rel. Mosley v. Carey (1979) 74 Ill.2d 527, 25 Ill. Dec. 669, 387 N.E.2d 325 5

People v. Rogers (1984) ____ Ill.App.3d ____, 79 Ill. Dec. 73, 78, 463 N.E.2d 211 ..... 12, 13

Reece v. Georgia (1955) 350 U.S. 85, 76 S.Ct. 167 6

Sanabria v. United States (1978) 437 U.S. 53, 98 S.Ct. 2170, 2178, 57 L.Ed.2d 43 12

United States v. DiFrancesco (1980) 449 U.S. 117, 101 S.Ct. 426, 433, 66 L.Ed.2d 328 .....6, 10, 11, 12

United States v. Jorn (1971) 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 11

United States v. Martin Linen Supply (1977) 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 ..... 6, 8, 10, 11, 12

United States v. Perez (1824) 9 Wheat 579 12

United States v. Wilson (1975) 420 U.S. 332, 337, 95 S.Ct. 1013, 1019, 43 L.Ed.2d 232 11

Urie v. Thompson (1949) 337 U.S. 163, 69 S.Ct. 1018 .. 6

Virginian Ry. Co. v. Muellens (1926) 271 U.S. 220, 46 S.Ct. 526..... 5

Wade v. Hunter (1949) 336 U.S. 684, 689, 69 S.Ct. 834, 93 L.Ed.2d 974 ..... 10, 12

Constitutional Provisions and Statutes:

Illinois Revised Statutes, Chapter 110A, Section 604(a)(1) 6, 7, 9

Illinois Revised Statutes, Chapter 110A, Section 604(f) 4, 5, 7, 9

Illinois Revised Statutes, Chapter 110A, Section 315 ... 7

Illinois Revised Statutes, Chapter 38, Section 114-12 ... 7

Constitution of the United States, 5th Amendment 3, 6, 7

Constitution of the United States, 14th Amendment ... 6, 7

28 United States Code, Section 1257(2) 3, 4, 7

28 United States Code, Section 1257(3)..... 3, 7

28 United States Code, Section 2106 ..... 3, 7

No.

IN THE

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OCTOBER TERM, 1983

SUSAN E. DAVIDSON,
Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

Appeal From The Supreme Court of Illinois

JURISDICTIONAL STATEMENT

INTRODUCTION

Susan Davidson, Appellant, appeals from the final judgment of the Supreme Court of Illinois entered April 27, 1984, letting stand the lower court's denials of her double jeopardy claim. This jurisdictional statement is submitted to demonstrate that the United States Supreme Court has jurisdiction of the case on appeal, or alternatively by way of certiorari, and that a substantial federal constitutional question is presented.

OPINIONS BELOW

After jeopardy attached at trial, the State was granted a mistrial over Appellant's objection to seek appellate review of

adverse evidentiary rulings[1] under an Illinois court rule[2] which permits such mid-trial appeals. The Appellate Court vacated the trial court's ruling as "untimely" and remanded the case for a new trial.[3] The Illinois Supreme Court denied leave to appeal.[4]

On remand, the trial court denied Appellant's motion[5] to dismiss the case on grounds of former jeopardy and upheld the validity of the court rule as against Appellant's challenge that the rule was repugnant to the Fifth Amendment.[6] The Appellate Court dismissed Appellant's appeal[7] and the Illinois Supreme Court denied leave to appeal[8] and Appellant's motion for reconsideration of that denial.[9] The Illinois Supreme Court also denied Appellant's request that it certify it had considered and decided a federal constitutional question.[10] Notice of appeal to the United States Supreme Court was filed May 1, 1984, in the Office of the Illinois Supreme Court Clerk.[11]

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[1] Appendix 1, pags A1-13.

[2] *Illinois Revised Statutes,* Chapter 110A, Section 604(a)(1), Appendix 12F, page A37.

[3] Appendix 1, pages A1-13

[4] Appendix 2, page A14.

[5] Appendix 3, pages A15-18.

[6] Appendix 4, page A19.

[7] Appendix 5, pages A20-22.

[8] Appendix 6, page A23.

[9] Appendix 7, page A24.

[10] Appendix 7, page A24.

[11] Appendix 8, pages A25-26.

JURISDICTION

This action is one in which the trial court on January 20, 1984, specifically upheld[12] the validity of a state court rule[13] as against the contention of its being repugnant to the Fifth Amendment to the *Constitution of the United States.*[14] The Appellate Court on February 9, 1984, dismissed Appellant's appeal[15] and the Illinois Supreme Court on April 3, 1984, denied leave to appeal.[16] Appellant's motion for reconsideration of that denial was denied on April 27, 1984,[17] and on May 1, 1984, Appellant filed notice of appeal[18] to the United States Supreme Court in the Office of the Illinois Supreme Court Clerk.

Jurisdiction of the United States Supreme Court on appeal, or alternatively by way of certiorari, is conferred by the following authorities, the pertinent text of which constitutional provisions and statutes is set forth in appendices 12 A-I hereto.

1. This appeal falls within the obligatory jurisdiction of the United States Supreme Court.

28 *United States Code,* Sections 1257(2) and 2106.

2. Alternatively, the United States Supreme Court may grant a writ of certiorari to consider the question presented by this case.

28 *United States Code,* Section 1257(3).

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[12] Appendix 4, page A19, Appendix 9, pages A27-31.

[13] Appendix 12F, page A37.

[14] Appendix 3, pages A15-18.

[15] Appendix 5, pages A20-22.

[16] Appendix 6, page A23.

[17] Appendix 7, page A24.

[18] Appendix 8, pages A25-26.

3. A state court rule is a statute for purposes of appeal under 28 *United States Code,* Section 1257(2).

Mayer v. Chicago (1971) 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372.

In re Griffiths (1973) 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910.

Lathrop v. Donohue (1961) 367 U.S. 820, 81 S.Ct. 1826.

4. There is no adequate and independent state ground to support the state judgment because federal and state double jeopardy guarantees are construed alike.

People v. Grod (1944) 385 Ill. 584, 53 N.E.2d 591, 595.

5. The Fifth Amendment double jeopardy guarantee is enforceable against the states through the Fourteenth Amendment.

Benton v. Maryland (1969) 395 U.S. 784, 89 S.Ct. 2056, 2062.

6. The state court's judgment in this case is final on the federal question and is not subject to further review in the state courts, and is therefor appealable pre-trial under 28 *United States Code,* Section 1257(2).

Cox Broadcasting Corp. v. Cohn (1975) 420 U.S. 469, 95 S.Ct. 1029, 1038, 43 L.Ed.2d 328.

Illinois Revised Statutes, Chapter 110A, Section 604(f).

Order of state appellate court, Appendix 5, Pages A20-22.

7. This appeal is from the final judgment of the highest court of a state within the meaning of 28 *United States Code,* Section 1257(2) and (3).

Harris v. Washington (1971) 404 U.S. 55, 92 S.Ct. 183, 30 L.Ed.2d 212.

8. A federal constitutional question was specifically raised and decided.

Motion to dismiss, Appendix 3, Pages A15-18.

Order of the trial court, Appendix 4, Page A19.

Partial report of proceedings, motion to dismiss in trial court, Appendix 9, Pages A27-31.

9. The denial of a double jeopardy claim is a final judgment on a federal issue which is appealable pre-trial.

Illinois Revised Statutes, Chapter 110A, Section 604(f).

Abney v. United States (1977) 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651.

People ex rel. Mosley v. Carey, (1979) 74 Ill. 2d 527, 387 N.E.2d 325, 25 Ill. Dec. 669.

10. If the judgment of the trial court is subject under state law to discretionary review by a higher court, such review must be sought.

Minneapolis, St. P. and S. S. M. Ry. Co. v. Rock (1929) 279 U.S. 410, 49 S.Ct. 363.

Virginian Ry. Co. v. Muellens (1926) 271 U.S. 220, 46 S.Ct. 526.

11. If the state courts of review decline to review a case, the trial court's judgment becomes that of the highest court in which decision could be had.

Minneapolis, St. P. and S.S. M. Ry. Co. v. Rocky, supra.

Virginia Ry. Co. v. Mullens, supra.

12. The time for filing an appeal or a petition for certiorari runs from the date of the higher court's refusal to review.

American Railway Express Co. v. Levee (1923) 263 U.S. 19, 20-21, 44 S.Ct. 11.

13. The failure of the state appellate courts to expressly rule upon a federal constitutional challenge to a state statute is equivalent to a finding of its validity within the meaning of 28 *United States Code,* Section 1257(2).

Lawrence v. State Tax Commissioner (1932) 286 U.S. 276, 52 S.Ct. 556.

Largent v. Texas (1943) 318 U.S. 418, 63 S.Ct. 667.

14. The fact that the highest court of a state in a second appeal refuses to consider the federal issues decided in a first appeal does not deprive the United States Supreme Court of jurisdiction to review the second judgment.

Reece v. Georgia (1955) 350 U.S. 85, 76 S.Ct. 167.

Urie v. Thompson (1949) 337 U.S. 163, 69 S.Ct. 1018.

Great Western Tel. Co. v. Burnham (1896) 162 U.S. 339, 16 S.Ct. 850.

15. A substantial question of federal constitutional law is raised in this case.

United States v. Martin Linen Supply (1977) 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642.

16. Illinois Supreme Court Rule 604(a)(1) is repugnant to the Fifth Amendment to the *Constitution of the United States.*

Constitution of the United States, Amendments 5 and 14.

Illinois Revised Statutes, Chapter 110A, Section 604(a)(1).

People v. Flatt (1980) 82 Ill.2d 250, 45 Ill. Dec. 158, 412 N.E.2d 509.

United States v. Martin Linen Supply, supra.

United States v. DiFrancesco (1980) 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328.

It is requested that this jurisdictional statement alternatively be deemed a petition for writ of certiorari pursuant to Title 28, *United States Code,* Section 1257(3) to the extent such may be necessary to confer jurisdiction of this case upon the United States Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 *United States Code,* Section 1257(2).

28 *United States Code,* Section 1257(3).

28 *United States Code,* Section 2106.

Constitution of the United States, Amendments 5 and 14.

Illinois Revised Statutes, Chapter 110A, Section 604(a)(1).

Illinois Revised Statutes, Chapter 110A, Section 604(f).

Illinois Revised Statutes, Chapter 110A, Section 315.

Illinois Revised Statutes, Chapter 38, Section 114-12.

The pertinent text of these constitutional and statutory provisions is set forth in appendices 12A - 12I hereto.

STATEMENT OF THE CASE

After jeopardy had attached at Appellant's criminal trial,[19] on February 18, 1982, the State, over Appellant's objection,[20] sought and obtained a mistrial based on the authority of Illinois Supreme Court Rule 604(a)(1)[21] to enable it to seek appellate

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[19] The mistrial here occurred after the jury had been impaneled and some testimony had been received. *People v. Davidson,* Appendix 1, pages A1-13. Jeopardy attaches when the jury is impaneled and sworn, and this integral part of the constitutional double jeopardy guarantee is applicable to the states. *Crist v. Bretz* (1978) 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24.

[20] Appendix 10, page A32.

[21] Appendices 1, pages A1-13 and 12F, page A37.

review of certain adverse evidentiary rulings. These rulings barred testimony against Appellant by her lawyer's secretary on grounds of attorney-client privilege and foreclosed the introduction of prejudicial handwriting exemplars obtained for comparison against documents seized from her attorneys safe deposit box.[22]

The State asserted on appeal that Appellant could be retried following appellate review without violating the double jeopardy clause because the mistrial was caused by Appellant's "untimely" mid-trial "motion to suppress".[23] At the earliest possible time Appellant raised the federal constitutional question as crucial by contesting the reviewing court's jurisdiction in the appeal,[24] arguing in effect that the state court rule could not be applied to Appellant consistent with considerations of double jeopardy.[25]

On July 8, 1983, the state appellate court vacated the trial court's evidentiary rulings as untimely and stated that since the mistrial was in its view triggered by Appellant's untimely motion to suppress, Appellant could be tried again notwithstanding double jeopardy considerations.[26] Appellant's petition for leave to appeal this adverse decision to the Illinois Supreme Court was denied on October 4, 1983.[27]

Following remand to the trial court and faced with the actuality of an imminent second trial, Appellant filed a motion to

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[22] *People v. Davidson,* Appendix 1, pages A1-13.

[23] *People v. Davidson,* Appendices 1, pages A1-13 and 12I, page A-38

[24] *United States v. Martin Linen Supply* (1977) 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642.

[25] Appendix 11, pages A33-34.

[26] *People v. Davidson,* Appendix 1, pages A1-13.

[27] Appendix 2, page A14.

dismiss[28] the case on grounds that the earlier mistrial was a constitutionally impermissible termination of the trial because Illinois Supreme Court Rule 604(a)(1) was repugnant to the Fifth Amendment to the United States Constitution, as being violative of double jeopardy and the right to a trial before a particular tribunal.[29]

The trial court on January 20, 1984, denied Appellant's motion to dismiss and expressly upheld the validity of the court rule as against Appellant's constitutional challenge.[30]

Prior to her second trial, Appellant sought review of the denial of her double jeopardy and jury trial claim,[31] but on February 9, 1984, the appeal was dismissed based on the supposed *res judicata* effect of the appellate court's earlier decision[32] as the law of the case.[33] The Illinois Supreme Court on April 3, 1984, denied Appellant's application for leave to appeal,[34] and on April 27, 1984, denied rehearing, declining also to certify that it had considered or decided a federal constitutional question concerning the validity of Illinois Supreme Court Rule 604(a)(1).[35]

Notice of appeal to the United States Supreme Court was filed on May 1, 1984, in the Office of the Clerk of the Illinois Supreme Court.[36]

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[28] Appendix 3, pages A15-18.

[29] Appendix 9, pages A27-31.

[30] Appendix 4, page A19.

[31] This appeal was pursuant to *Illinois Revised Statutes,* Chapter 110A, Section 604(f), Appendices 12G, page A37 and 12H, page A37.

[32] *People v. Davidson,* Appendix 1, pages A1-13.

[33] Appendix 5, pages A20-22.

[34] Appendix 6, page A23.

[35] Appendix 7, page A24.

[36] Appendix 8, pages A25-26.

THE QUESTION IS SUBSTANTIAL

This appeal raises the serious and substantial question of the constitutionality of a state court rule[37] which permits Appellant and all defendants in Illinois criminal cases to be tried more than once for the same offense.[38]

The Illinois court rule here at issue is an eccentricity. No jurisdiction other than Illinois has been found which permits mid-trial appeal of evidentiary rulings by the State in criminal cases after jeopardy has attached and over a defendant's objection, then retrial before a second tribunal.

The Fifth Amendment prohibits placing a person twice in jeopardy for the same offense. The states are bound by this prohibition. *Benton v. Maryland* (1969) 395 U.S. 784, 89 S.Ct. 2056, 2062. Jeopardy attaches when the jury is impaneled and sworn, *Crist v. Bretz* (1978), *supra;* at note 19, and attached at Appellant's trial.[39]

Consistent with the Fifth Amendment the government may not appeal adverse rulings after jeopardy has attached where to do so would necessitate another trial or further fact finding proceedings, *United States v. Martin Linen Supply* (1977) 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642; *Finch v. United States* (1977) 433 U.S. 676, 97 S.Ct. 2909, 53 L.Ed.2d 1048; *Green v. United States* (1957) 355 U.S. 184, 78 S.Ct. 221, since such would violate double jeopardy and the defendant's "valued right to have his trial completed by a particular tribunal." *Arizona v. Washington* (1978) 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717, quoting from *Wade v. Hunter* (1949) 336 U.S. 684, 689, 69 S.Ct. 834, 93 L.Ed.2d 974; *United States v. DiFrancesco* (1980) 449 U.S. 117, 101 S.Ct. 426, 433, 66

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[37] Appendix 12F, page A37.

[38] *People v. Davidson,* Appendix 1, pages A1-13, *People v. Flatt* (1980) 82 Ill. 2d 250, 45 Ill. Dec. 158, 412 N.E.2d 509.

[39] Appendix 1, pages A1-13.

L.Ed.2d 328. The Illinois rule is in conflict with these authorities.

The Illinois rule goes far beyond the federal rule which permits government appeal after jeopardy has attached only from a judgment *non obstante verdicto, United States v. Wilson* (1975) 420 U.S. 332, 337, 95 S.Ct. 1013, 1019, 43 L.Ed.2d 232, or from the sentence imposed, *United States v. DiFrancesco, supra.* These appeals are consistent with the double jeopardy clause because neither requires another trial or further fact finding proceedings. *United States v. Martin Linen Supply, supra; Finch v. United States, supra; Green v. United States, supra.* "The double jeopardy focus . . . is not on the appeal, but on the relief that is requested, . . ." *United States v. DiFrancesco, supra,* at 101 S.Ct. 435. The only relief available to the State following successful mid-trial appeal in Illinois is a new trial and further fact finding before a different tribunal, specifically prohibited by these constitutional authorities.

Following a successful appeal by the State under Rule 604(a)(1), Illinois permits a defendant to be placed on trial for a second time before a different jury for the same offense,[40] which has been held not to violate a defendant's right not to be twice placed in jeopardy for the same offense.[41] The Illinois rule is an effort to attack the supposed unfairness to the State of the double jeopardy clause, which prohibits appeal of acquittals by the prosecution even if brought about by erroneous rulings of the trial court. *United States v. Jorn* (1971) 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543; *Fong Foo v. United States* (1962) 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629.

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[40] The language in *People v. Flatt, supra,* at note 38, and *People v. Davidson,* Appendix 1, pages A1-13 remanding "for a continuation of the trial" following successful government appeals actually translates in practice to remand for a completely new trial and further fact finding before a different tribunal, see Appendix 12I, page A-38.

[41] *People v. Flatt, supra,* at note 38; *People v. Davidson,* Appendix 1, pages A1-13.

It is respectfully submitted however that there is no constitutional difference under the double jeopardy clause between permitting the State to appeal following verdicts of acquittal, which is constitutionally prohibited, *Fong Foo v. United States, supra; United States v. Martin Linen Supply, supra; Green v. United States, supra; Sanabria v. United States* (1978) 437 U.S. 53, 98 S.Ct. 2170, 2178, 57 L.Ed.2d 43, and in permitting the State in all criminal cases to appeal mid-trial after jeopardy has attached under Illinois Supreme Court Rule 604(a)(1) by certifying, in effect, that an acquittal is imminent, *People v. Rogers* (1984) ___ Ill.App.3d ___, 79 Ill. Dec. 73, 78, 463 N.E.2d 211, *Green v. United States, supra,* at 78 S.Ct. 224, as occurred in the instant case.

The Illinois Rule is in conflict with a long line of rulings of this court. *United States v. Perez* (1824) 9 Wheat. 579; *Illinois v. Sommerville* (1973) 410 U.S. 458, 461-63, 93 S.Ct. 1066, 35 L.Ed.2d 425; and *United States v. DiFrancesco, supra,* at 449 U.S. 130. In cases where the trial is terminated without the defendant's consent, as here, the government must establish that the termination was occasioned by "manifest necessity" in order to avoid the double jeopardy bar to retrial. Illinois instead permits mistrial at the sole and unreviewable discretion of the prosecutor and completely removes this discretion from the trial judge.[42] This does not comport with the constitutional requirement that the trial judge himself determine whether "manifest necessity" requires a termination of trial. *Wade v. Hunter, supra; Arizona v. Washington* (1978) 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717; *Downum v. United States* (1963) 372 U.S. 735, 83 S.Ct. 1033.

Appellant's trial was terminated over her specific objection.[43] There was no determination by the trial judge that mistrial was

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[42] *People v. Flatt, supra,* at note 38, *People v. Davidson,* Appendix 1, pages A1-13, *People v. Rogers, supra; People v. Johnson* (1983) 113 Ill.App.3d 367, 69 Ill. Dec. 285, 447 N.E.2d 502.

[43] Appendix 10, page A32.

required by "manifest necessity." Mistrial was declared merely to enable the State to appeal adverse evidentiary rulings. The decision to cause the mistrial was solely that of the prosecutor. While actual defense misconduct may in the proper circumstance require mistrial due to "manifest necessity", *Arizona v. Washington, supra,* "no precedent has yet suggested that where (a) defendant merely makes a proper...trial objection, the defendant has deliberately elected to forgo his right to have his guilt or innocence determined by the first trier of fact." *People v. Rogers, supra,* at 79 Ill.Dec. 78. The state Appellate Court created such a precedent when it determined that Appellant's trial objections were "untimely" and therefore the underlying cause of the mistrial,[44] and her retrial therefore permissible.

The issue presented by this appeal is of paramount and substantial importance to the citizens of Illinois and those of every state, since the destruction of the double jeopardy rights of one person or of the citizens of one state is to put in jeopardy those same rights of all citizens of every state. If permitted to stand, the Illinois rule may be reasonably expected to generate further state and federal efforts to erode the constitutional guarantee against being twice placed in jeopardy for the same offense. As affects this Appellant, since the state Appellate Court held[45] Appellant's double jeopardy claim barred by *res judicata,* such claim may be forever barred even after possible conviction in the absence of present review by this Supreme Court.

The Supreme Court of the United States has not previously considered the validity or effect of such a far reaching rule. If the cited established precedents of this court do not resolve the

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[44] *People v. Davidson,* Appendix 1, pages A1-13.

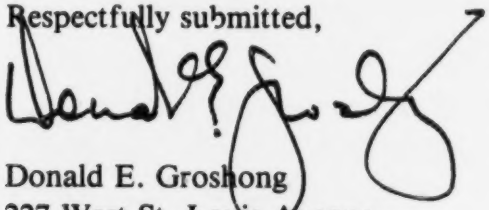
[45] Appendix 5, page A20-22.

question presented, it is respectfully suggested that plenary consideration with briefs on the merits and oral argument will aid and assist the Court in such resolution.

CONCLUSION

For these reasons Appellant respectfully prays this Honorable United States Supreme Court note probable jurisdiction of this appeal, or, in the alternative, that a writ of certiorari be granted and this cause be set down for full briefing and oral argument on the merits and this issue of the constitutionality of *Illinois Revised Statutes,* Chapter 110A, Section 604(a)(1), be resolved.

Respectfully submitted,



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Admitted to the Bar of the Supreme Court of the United States on November 14, 1983

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States of America, hereby certifies that a true and correct copy of the above, foregoing and attached Jurisdictional Statement was duly served upon the attorney of record of all parties to the above entitled cause required to be served, by enclosing the same in an envelope duly addressed to such attorney at his business address as disclosed by the pleadings of record herein, with first class postage fully prepaid, and by depositing said envelope into a United States Post Office mailbox located in the Village of East Alton, State of Illinois, on the 24th day of July, A.D., 1984.

SUSAN E. DAVIDSON, Appellant

By _____

DONALD E. GROSHONG
Attorney for Appellant
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227 West St. Louis Avenue
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(618) 254-0147

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

AFFIDAVIT

Donald E. Groshong, being first duly sworn according to law, on oath deposes and says that he has read the above, foregoing and attached Certificate of Service and that he is familiar with

the contents thereof and the matters contained therein, and that they are true and correct to the best of his knowledge and belief.

Donald E. Groshong, Affiant

SUBSCRIBED and SWORN to before me this 24th day of July, 1984.

Notary Public

My Commission Expires: 7/29/85

APPENDIX

APPENDIX 1

APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

No. 82-125

People of the State of Illinois,
Plaintiff-Appellant,

vs.

Susan Davidson,
Defendant-Appellee.

July 8, 1983

HARRISON, Presiding Justice:

This is an interlocutory appeal by the People from two orders which the circuit court of Madison County entered during trial. The People raise three issues for review: first, whether the trial court was without authority after trial had commenced to rule on motions raising issues collateral to a determination of the defendant's guilt or innocence; second, whether the trial court violated principles of collateral estoppel in barring testimony by a state's witness; and third, whether the trial court's orders were substantively erroneous. The defendant's brief raises the additional issue of whether this court has jurisdiction over the instant appeal which, she contends, is from midtrial evidentiary rulings unappealable under Supreme Court Rule 604(a). For the reasons which follows we vacate the orders of the circuit court and remand for a continuation of the trial.

The defendant was charged by information with the offenses of murder under an accountability theory, solicitation, and conspiracy. The charges stemmed from the murder of the defen-

dant's husband on October 31, 1979. Letters purporting to have been written by the defendant to her alleged paramour and co-conspirator, William Gill, were discovered by the prosecution and obtained pursuant to a search warrant. The circuit court subsequently ordered the defendant to execute handwriting exemplars for comparison with the letters. Monica Westbrook, an employee at the same law firm which employed the defendant as a secretary, allegedly overheard an inculpatory conversation at the law firm's office between the defendant and a lawyer with the firm. A motion to suppress both the letters and Westbrook's testimony contended that the items were procured as a result of an illegal search and seizure. A hearing on this motion was held and arguments heard before Judge Matoesian who denied the motion on May 5, 1981. Judge Matoesian thereafter recused himself from the case, after the defense filed a motion for substitution. After the jury had been impaneled and some testimony received, the defendant orally moved to exclude the handwriting exemplars from evidence on the grounds that compelling the defendant to write verbatim excerpts from some of the letters violated the defendant's fifth amendment rights and that the copied statements were inflammatory and therefore prejudicial. The defendant also moved to exclude Westbrook's testimony on the basis of an asserted attorney-client privilege. The trial court orally allowed both motions. The State moved for a mistrial so that an interlocutory appeal could be taken from the orders. This motion was also allowed by the trial court. The prosecutor subsequently filed a certificate of substantial impairment.

The people first challenge the authority of the trial court to rule on the defendant's oral motions after trial had begun. This issue is interrelated with the defendant's question of our jurisdiction to hear this appeal and the two issues will be

discussed together. The State's right to appeal from midtrial orders was explained by the supreme court in *People v. Flatt* (1980), 82 Ill.2d 250, 45 Ill.Dec. 158, 412 N.E.2d 509. The supreme court there noted that a defendant's right to file motions to suppress after trial has commenced is limited by section 114-12 of the Code of Criminal Procedure of 1963 (Ill.Rev.Stat. 1981, ch. 38, par. 114-12). (82 Ill.2d 250, 264, 45 Ill.Dec. 158, 412 N.E.2d 509). Under the statute, the trial court has discretion to entertain a motion to suppress even though made during trial, providing the motion alleges that the evidence was illegally seized. (82 Ill.2d 250, 262, 45 Ill.Dec. 158, 412 N.E.2d 509.) The State's right to appeal from orders granting such motions is governed by Supreme Court Rule 604 which provides in relevant part that "[i]n criminal cases the State may appeal only from an order or judgment the substantive effect of which results in * * * suppressing evidence." (87 Ill.2d R. 604(a)(1).) The *Flatt* court reasoned that because

> "the right of a defendant to file motions to suppress after the trial has commenced is limited by the provisions of section 114-12(c), the State's right to appeal from suppression orders during trial is limited to orders entered allowing these motions. However, some review must be given the prosecution of orders entered granting motions to suppress not authorized under section 114-12(c) which should have been made prior to trial. If the reviewing court determines that the motion was not within the ambit of section 114-12(c) and that the court wrongfully considered it during the trial, the State must be permitted a review of the authority of the court to enter the suppression order, even if it did not involve illegally seized evidence and section 114-12(c) of the Code of Criminal Procedure of 1963. The review would not, in such a case,

be of the merits of the court's ruling but rather would concern the trial court's authority to entertain the motion." 82 Ill.2d 250, 264, 45 Ill.Dec. 158, 412 N.E.2d 509.

The first step in analyzing the instant case is to determine whether the State may seek appellate review of the trial court's rulings. Whether a ruling which operates to prevent the admission of evidence is reviewable in the appellate court is determined solely by the prosecutor's certificate of substantial impairment. (82 Ill.2d 250, 264, 45 Ill.Dec. 158, 412 N.E.2d 509, see *People v. Tomasello* (1981), 98 Ill.App.3d 588, 597, 54 Ill.Dec. 35, 424 N.E.2d 785.) This conclusion is bolstered by the supreme court's holding in *People v. Young* (1980), 82 Ill.2d 234, 45 Ill.Dec. 150, 412 N.E.2d 501. The court there stated that

> "Rule 604(a)(1) allows an interlocutory appeal by the State of a pretrial suppression order *whenever the prosecutor certifies to the trial court that the suppression substantially impairs the State's ability to prosecute the case.* Our intention in requiring this certification is not to formulate a standard by which courts may determine the appealability of a particular order. As this court noted in *[People v.] Van De Rostyne* [(1976) 63 Ill.2d 364, 349 N.E.2d 16], that would indeed be a heavy burden, one which we do not believe justified by the marginal diminution in the number of appeals which we anticipate such a procedure would produce. *Instead we rely solely upon the good-faith evaluation by the prosecutor of the impact of the suppression order on his case.*" *(People v. Young* (1980), 82 Ill.2d 234, 247, 45 Ill.Dec. 150, 412 N.E.2d 501 (emphases added).)

While *Young* applied this rule to pretrial orders, *Flatt* expressly adopted the rule in connection with midtrial rulings. "The right of such review however, does not extend to rulings which do no

more than exclude evidence made during trial but must be limited to rulings which substantially impair the State's ability to prosecute the case *as shown by the certificate of the prosecutor* following the rationale of our holding in *People v. Young* (1980), 82 Ill.2d 234 [45 Ill.Dec. 150, 412 N.E.2d 501]." (*People v. Flatt* (1980), 82 Ill.2d 250, 264-265, 45 Ill.Dec. 158, 412 N.E.2d 509.) We distinguish here "reviewability" from "appealability"; the former is a limited concept confined to the narrow issue of the State's right to seek appellate evaluation of the trial court's authority to entertain the defendant's motion (See 82 Ill.2d 250, 264, 45 Ill.Dec. 158, 412 N.E.2d 509), while the latter is the ultimate conclusion under Rule 604(a). The prosecutor in the case *sub judice* filed a certificate of substantial impairment and we hold that we therefore must determine whether the trial court had the authority under section 114-12 to consider the defendant's motions.

The defendant has cited the recent appellate court case of *People v. Johnson* (1983), 113 Ill.App.3d 367, 69 Ill.Dec. 285, 447 N.E.2d 502, as authority for a contrary position. In *Johnson* the defendant moved during trial to preclude the State from introducing testimony relating to the defendant's allegedly false exculpatory statement. The trial court allowed the motion and the State obtained a mistrial for the purpose of maintaining an interlocutory appeal. In determining whether the State could appeal from the trial court's order, the appellate court in *Johnson* stated that "Supreme Court Rule 604(a)(1) permits the State to bring an appeal from an order 'the substantive effect of which results in * * * suppressing evidence.' (87 Ill.2d R. 604(a)(1).) Stated differently, the issue before this court is whether the trial court's ruling was, in fact, an order 'suppressing evidence' as that term is used in Supreme Court Rule 604." (*People v. Johnson* (1983), 113 Ill.App.3d 367, 370, 69 Ill.Dec.

285, 447 N.E.2d 502.) The court then reviewed the supreme court's opinions in *Young* and *Flatt* and discussed the problems entailed in defining a suppression order. The court determined that various public policies, including that of judicial economy, militate against interlocutory appeals. The court concluded that

> "a midtrial order 'suppressing evidence,' as that term is used in Supreme Court Rule 604(a)(1), is one in which the evidence is suppressed and denied admittance because it was illegally obtained in violation of a constitutional or statutory right, or even though lawfully obtained, its admittance is to be denied because of a statutory prohibition or the violation of a court rule or some other grounds besides the recognized rules concerning the admission of evidence." *(People v. Johnson* (1983), 113 Ill.App.3d 367, 373-374, 69 Ill.Dec. 285, 447 N.E.2d 502.)

A broader rule, noted the court, would cause grave disruption of criminal trial proceedings and would violate defendant's constitutional rights to due process and fair trial." (113 Ill.App.3d 367, 374, 69 Ill.Dec. 285, 447 N.E.2d 502.) The court then analyzed the trial court's order and determined that it was an evidentiary ruling rather than a suppression order. The court dismissed the appeal and ordered the defendant freed on double jeopardy grounds. While we do not disagree with the court's analysis in determining whether the trial court's ruling was "evidentiary," we cannot agree that it is that analysis which governs the reviewability of the trial court's order in the first instance. As indicated above, the supreme court has extended appellate review under Rule 604(a)(1) "to rulings which substantially impair the State's ability to prosecute the case as shown by the certificate of the prosecutor following the rationale of our holding in *People v. Young* (1980), 82 Ill.2d 250, 264 [45 Ill.Dec. 150, 412 N.E.2d 501]." *(People v. Flatt* (1980), 82

Ill.2d 250, 264-265, 45 Ill.Dec. 158, 412 N.E.2d 509.) The supreme court has thus read Rule 604(a)(1) more broadly than the literal interpretation of the *Johnson* decision. Moreover, the concern for public policy which underlies the *Johnson* opinion has already been explored by th supreme court in both *Young* and *Flatt*. The supreme court in *Flatt* balanced the concerns expressed by the *Johnson* court against the countervailing policy considerations arising form the unavailability of review from judgments of acquittal and the unfairness of weakening the State's case by the erroneous entry of suppression orders during trial (*People v. Flatt* (1980), 82 Ill.2d 250, 264, 45 Ill.Dec. 158, 412 N.E.2d 509), and concluded that appellate review should extend to midtrial rulings which the prosecutor determines to be a substantial impairment to his case (82 Ill.2d 250, 264-265, 45 Ill.Dec. 158, 412 N.E.2d 509). Consequently, we believe that the supreme court has already struck the balance between competing public interests and we, as an intermediate court of review, are not in a position to reexamine that policy determination. Accordingly, we decline to follow the mechanics of the decision in *People v. Johnson,* and will proceed to an analysis of the trial court's authority to entertain the defendant's motions.

Under *Flatt,* whether an order "suppresses" or "excludes" evidence determines whether the underlying motion was within section 114-12 and, concomitantly, whether the trial court had the authority to rule on the merits of the motion. (82 Ill.2d 250, 264-265, 45 Ill.Dec. 158, 412 N.E.2d 509.) Although we have already held that the prosecutor's certificate controls the limited question of the reviewablity of the trial court's order, that certificate is not dispositive of whether the defendant's motion was a motion to "suppress" *within section 114-12,* nor is the defendant's designation of the motion controlling. (See *People v.*

Flatt (1980), 82 Ill.2d 250, 266, 45 Ill.Dec. 158, 412 N.E.2d 509.) We believe that the determination of whether the trial court "suppressed" evidence was left to the reviewing court by the decision in *Flatt*. The supreme court there stated that "*where the reviewing court has determined* that the trial court entertained and allowed a motion to suppress that is not authorized by section 114-12(c)" the order should be vacated and the cause remanded. (82 Ill.2d 250, 265, 45 Ill.Dec. 158, 412 N.E.2d 509. See also *People v. Tomasello* (1981), 98 Ill.App.3d 588, 598, 54 Ill.Dec. 35, 424 N.E.2d 785.) The court in *Flatt* looked to the "gist of the motion" in deciding whether the motion sought suppression of evidence. (82 Ill.2d 250, 266, 45 Ill.Dec. 158, 412 N.E.2d 509.) In *People v. Phipps* (1980), 83 Ill.2d 87, 46 Ill.Dec. 164, 413 N.E.2d 1277, the supreme court indicated that a court of review should consider whether the "substantive effect, rather than simply [the] form, of the trial court's order * * * does operate to prevent evidence from being admitted." 83 Ill.2d 87, 90-91, 46 Ill.Dec. 164, 413 N.E.2d 1277.

The standard governing the classification of an order by the reviewing court as 'excluding" or "suppressing" evidence under section 114-12 has proven elusive. In *Flatt,* the supreme court referred to "an issue collateral to the determination of defendant's guilt or innocence" as the basis for a motion to suppress. (82 Ill.2d 250, 266, 45 Ill.Dec. 158, 412 N.E.2d 509.) The appellate court, in a pre-*Flatt* case, discussed this concept in greater detail.

> "In general that rule has referred to the suppression of evidence, which although probative, has been obtained in violation of the constitutional privilege of the accused against self-incrimination [citation] or his right to be free from unreasonable searches and seizures [citation]. The purpose of the exclusion is not to aid in the truth-seeking

> process but to deter future deprivations of individuals' rights by similar attempts to improperly obtain evidence." *(People v. Jackson* (1979), 67 Ill.App.3d 24, 27, 23 Ill.Dec. 797, 384 N.E.2d 591.)

The court concluded that the order, which refused admission of evidence because its prejudicial effect outweighed its probative value, was evidentiary in nature rather than suppressive. (See also *People v. Macaluso* (1976), 36 Ill.App.3d 592, 344 N.E.2d 476.) Similarly, the court in *People v. Johnson* (1983), 113 Ill.App.3d 367, 69 Ill.Dec. 285, 447 N.E.2d 502, held that an order based on lack of relevance "excluded" evidence.[1] The appellate court has also held that an order which was based on the prosecution's failure to establish a chain of custody in the handling of a document "excluded" evidence. (*People v. Williams* (1982), 108 Ill.App.3d 219, 220, 63 Ill.Dec. 948, 438 N.E.2d 1311.) Conversely, the court in *People v. Tomasello* (1981) 98 Ill.App.3d 588, 54 Ill.Dec. 35, 424 N.E.2d 785, held that an order which struck a witness' testimony because of a violation of a statute prohibiting the State from paying an investigator a fee contingent on the success of the prosecution was suppressive in nature. In *People v. Stuckey* (1979), 78 Ill.App.3d 1085, 1090, 34 Ill.Dec. 422, 398 N.E.2d 97, the trial court's order precluding identification testimony because of alleged police misconduct in failing to produce photographs was held to be a suppression ruling. In *Flatt,* the supreme court held that testimony concerning fingerprint evidence gleaned from a pane of glass not produced by the prosecution had been "sup-

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[1] While we disagree with the *Johnson* court's method of determining appealability, we are in harmony with that court's exposition and application of the rule differentiating "suppression" from "exclusion" of evidence. See 113 Ill.App.3d 367, 373-374, 69 Ill.Dec. 285, 447 N.E.2d 502.

pressed" by the trial court. In *People v. Phipps* (1980), 83 Ill.2d 87, 46 Ill.Dec. 164, 413 N.E.2d 1277, the court held that an order prohibiting the State from calling any witness who invoked a statutory privilege was suppressive. The court in *People v. Meyers* (1982), 109 Ill.App.3d 862, 865, 65 Ill.Dec. 484, 441 N.E.2d 397, held that the trial court's refusal to admit evidence obtained in violation of the accused's sixth amendment right to counsel was an order "suppressing" evidence. The rule which thus emerges from the cases is that a motion based on criteria relating to the perceived truthfulness, reliability, or relevance of the proffered evidence "excludes" evidence and section 114-12(c) does not preclude the trial court from ruling on such a motion; a motion which is based on public policies forbidding the use of certain evidence despite its relevance and apparent trustworthiness "suppresses" evidence and section 114-12(c) prohibits the trial court from considering such a motion during trial absent an allegation of illegal seizure. See *People v. Flatt* (1980) 82 Ill.2d 250, 266, 45 Ill.Dec. 158, 412 N.E.2d 509.

The defendant argues strenuously that her motions were not motions to "suppress" but rather only ones seeking to "exclude" evidence and therefore were appropriately made during trial under section 114-12(c). The defendant further argues that because the motions were not motions to suppress, the trial court's orders are substantively unappealable under Supreme Court Rule 604(a), and the appeal must therefore be dismissed. (See *People v. Macaluso* (1976), 36 Ill.App.3d 592, 344 N.E.2d 476.) While we agree that dismissal of the appeal would be the proper remedy under Rule 604(a) were we to decide that the trial court "excluded" evidence, the record does not support defendant's interpretation of the trial court's orders.

The trial court's first ruling occurred after the jury had been sworn and impaneled and after at least one witness had testified.

Before the prosecution called its expert witness to testify to his comparison of the handwriting samples, the defense sought to preclude the prosecution from introducing the handwriting exemplars. Though two bases for the defense position were presented to the trial court, the record reflects that the court predicated its ruling on a fifth amendment ground. After hearing arguments of counsel the trial court sought clarification of the defendant's motion.

> "The Court: If they are told what to write, then you are saying that could be of a magnitude that violates the Fifth Amendment[?]
>
> [Defense Counsel]: Absolutely."

After further argument the trial court sustained the objection. The substantive effect of the trial court's ruling was to preclude the admission not only of the exemplars but also of the prosecution's entire expert testimony. The basis for the ruling was a perceived implication of the defendant's fifth amendment privilege against self-incrimination (see generally Annot., 43 A.L.R.3d 653 (1972)). That doctrine involves allegations of illegal State conduct and the public policy against encouraging such acts rather than an evaluation of reliability or relevance. *(Cf. People v. Flatt* (1980), 82 Ill.2d 250, 256, 45 Ill.Dec. 158, 412 N.E.2d 509; *People v. Jackson* (1979), 67 Ill.App.3d 24, 27, 23 Ill.Dec. 797, 384 N.E.2d 591; *People v. Macaluso* (1976), 36 Ill.App.3d 592, 594, 344 N.E.2d 476.) Accordingly, the issue was collateral to a determination of the defendant's guilt or innocence and was therefore a motion to suppress. *(People v. Flatt* (1980), 82 Ill.2d 250, 266, 45 Ill.Dec. 158, 412 N.E.2d 509.) The order is therefore appealable under Rule 604(a) and we need not dismiss the appeal. For the same reason, the motion should have been made before trial; because it was not, and no

allegation of illegal seizure was made, the motion was untimely under section 114-12(c) and the trial court should not have considered it. *(People v. Flatt* (1980), 82 Ill.2d 250, 265-266, 45 Ill.Dec. 158, 412 N.E.2d 509.) We accordingly vacate the order.

The second ruling at issue arose from the defendant's motion "to exclude Miss Westbrook's testimony based on the attorney-client privilege * * *." Westbrook's counsel indicated to the court that Westbrook would not testify unless the court ruled that the testimony was not barred by the attorney-client privilege. The trial court ruled that it "would honor the attorney'client privilege as to the testimony of Monica Westbrook." Like the fifth amendment exclusionary rule, the attorney-client privilege operates to preclude the admission of evidence on a basis of public policy rather than an evaluation of accuracy, relevance, or credibility. (*Cf. People v. Flatt* (1980), 82 Ill.2d 250, 266, 45 Ill.Dec. 158, 412 N.E.2d 509; *People v. Jackson* (1979), 67 Ill.App.3d 24, 27, 23 Ill.Dec. 797, 384 N.E.2d 591; *People v. Macaluso* (1976), 36 Ill.App.3d 592, 594, 344 N.E.2d 476.) We therefore conclude that the trial court "suppressed" Westbrook's testimony. This conclusion is bolstered by the supreme court's decision in *People v. Phipps* (1980), 83 Ill.2d 87, 46 Ill.Dec. 164, 413 N.E.2d 1277, where the court determined that an order strikingly similar to the one now under consideration had "suppressed" evidence.

> "The court's order states that no testimony will be permitted to be taken from the witnesses unless the witnesses take the affirmative act of waiving their privilege and turn over the files and reports to the defense. Hence, as presently constituted, the trial would proceed without these witnesses unless some further acts were performed. Evidence is thus being 'suppressed' at the moment." (83 Ill.2d 87, 91, 46 Ill.Dec. 164, 413 N.E.2d 1277.)

We therefore hold that the order suppressed Westbrook's testimony and consequently was untimely. The trial court was therefore without authority to consider it. *(People v. Flatt* (1980), 82 Ill.2d 250, 265-266, 45 Ill.Dec. 158, 412 N.E.2d 509.) Accordingly, the order is vacated.

In view of the result reached, we need not consider the State's other assertions of error, although a brief comment on the double jeopardy aspect of this case is appropriate. Because the mistrial was triggered by the defendant's untimely motions to suppress, she may be tried without violating the proscription against double jeopardy. (See *People v. Flatt* (1980), 82 Ill.2d 250, 265, 45 Ill.Dec. 158, 412 N.E.2d 509.) Accordingly, the cause is remanded to the circuit court of Madison County for a continuation of the trial.

Vacated and remanded.

KASSERMAN and KARNS, JJ., concur.

APPENDIX 2

Illinois Supreme Court
Juleann Hornyak, Clerk
Supreme Court Building
Springfield, Illinois 62706
(217) 782-2035

October 4, 1983

Mr. Donald E. Groshong
Groshong, Moorman & Fahrenkamp
227 W. St. Louis Avenue
East Alton, IL 62024

No. 58882 - People State of Illinois, respondent vs. Susan Davidson, petitioner. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today *DENIED* the petition for leave to appeal in the above entitled cause.

Very truly yours,

Juleann Hornyak
Clerk of the Supreme Court

P. S. The Mandate of this Court will issue to the Appellate Court on October 26, 1983.

APPENDIX 3

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

No. 79-CF-637

People of the State of Illinois,
Plaintiff,

vs.

Susan E. Davidson,
Defendant.

MOTION TO DISMISS

Comes now the Defendant, SUSAN E. DAVIDSON, by and through her attorneys of record, DONALD E. GROSHONG and G. EDWARD MOORMAN of GROSHONG and MOORMAN, LTD., and pursuant to *Illinois Revised Statutes,* Chapter 38, Sections 114-1, 103-5 and 3-3(a)(3), the Fifth, Sixth and Fourteenth Amendments to the *Constitution of the United States* and Article I, Sections 8 and 10 of the *Constitution of the State of Illinois,* and hereby respectfully moves this Honorable Court dismiss the above-entitled cause, with prejudice, and in support of which Motion Defendant respectfully states as follows:

1. That the above-entitled cause, including all counts thereof, heretofore was called to trial, both the People of the State of Illinois and Defendant having announced to the Court that they were ready for trial;

2. That a jury of twelve, including two alternates, were selected and sworn to try this cause;

3. That opening statements were made to the jury by both Defendant and the State, following which the State called witnesses who were sworn, and who testified and were cross-examined;

4. That prior to verdict and over the repeated objections of Defendant, the State herein demanded and the Court granted a mistrial in the trial of this cause;

5. That such was an improper termination of the trial;

6. That a second, subsequent or further prosecution of the instant cause is barred by prohibitions against double jeopardy, pursuant to the Fifth and Fourteenth Amendments to the *Constitution of the United States* and Article I, Section 10 of the *Constitution of the State of Illinois;*

7. That, to the extent *Illinois Revised Statutes,* Chapter 110A, Section 604(a), being Illinois Supreme Court Rule 604(a)(1) and (4), purports to authorize under the facts in the instant cause mid-trial interlocutory appeals by the State after jeopardy has attached, such statute and Supreme Court Rule is unconstitutional and is violative of Defendant's rights to be free from double jeopardy pursuant to Article I, Section 10 of the *Constitution of the State of Illinois* and the Fifth and Fourteenth Amendments to the *Constitution of the United States,* and to a speedy trial pursuant to *Illinois Revised Statutes,* Chapter 38, Section 103-5, the Sixth and Fourteenth Amendments to the *Constitution of the United States* and Article 1, Section 8 of the *Constitution of the State of Illinois;*

8. That further prosecution of the instant cause is barred by double jeopardy;

9. That, to the extent said Illinois Supreme Court Rule 604(a))1) would appear to authorize Defendant's second and

subsequent prosecution or further prosecution following the attachment of jeopardy and improper mistrial and the pursuit of mid-trial interlocuatory appeal by the State, such Supreme Court Rule is unconstitutional both on its face and as applied to Defendant;

10. That, to the extent said Illinois Supreme Court Rule 604(a)(3) would appear to toll the speedy trial provisions of statutory and constitutional law above cited, such statute is unconstitutional both on its face and as applied, as a violation of the proscription against double jeopardy and the requirement of speedy trial contained in the *Constitution of the United States of America,* Amendments Six and Fourteen.

11. That *Illinois Revised Statutes,* Chapter 110A, Section 604(a)(1), being Illinois Supreme Court Rule 604(a)(1), is unconstitutional on its face by reason of repugnancy to the *Constitution of the United States of America,* Amendments Five and Fourteen.

12. That *Illinois Revised Statutes,* Chapter 110A, Section 604(a)(1), being Illinois Supreme Court Rule 604(a)(1), is unconstitutional as applied by reason of repugnancy to the *Constitution of the United States of America,* Amendments Six and Fourteen.

WHEREFORE, Defendant respectfully prays this Honorable Court dismiss the above-entitled cause and all counts thereof with prejudice by reason of the violation of Defendant's statutory and constitutional rights to a speedy trial and since further prosecution hereof is absolutely barred by double jeopardy.

GROSHONG and MOORMAN, LTD.

By: Donald E. Groshong

and

By: G. Edward Moorman

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East Alton, IL 62024
Phone: 618-254-0147

APPENDIX 4

THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

No. 79-CF-637

People of the State of Illinois,
Plaintiff,

vs.

Susan Davidson,
Defendant.

ORDER

Matter comes on for hearing on Motion to Dismiss by Defendant. Parties present. Argument made and heard.

Court denies defendant's Motion to Dismiss, finding that said statute is not unconstitutional.

Date 1-20-84

Charles Romani, Jr.
JUDGE

APPENDIX 5

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

No. 5-84-0057

People of the State of Illinois,
Plaintiff-Appellee,

vs.

Susan E. Davidson,
Defendant-Appellant.

Appeal from the Circuit
Court of Madison County.

Honorable
Charles V. Romani, Jr.
Judge Presiding.

ORDER

THIS CAUSE COMES on before the court on motion of the State to dismiss the appeal in this cause, the court having considered said motion and the objection thereto filed by defendant, and it appearing to the court that an appropriately certified short record has been filed in this court, the court having examined said record and having been fully advised in the premises;

THE COURT FINDS that the facts surrounding the previous trial and appeal of this cause are set forth in this court's opinion in *People v. Davidson* (1983), 116 Ill.App.3d 164, 451 N.E.2d 978. The present dispute involves the last paragraph of that opinion. Therein this court stated:

> "In view of the result reached, we need not consider the State's other assertions of error, although a brief comment on the double jeopardy aspect of this case is appropriate. Because the mistrial wa triggered by the defendant's untimely motions to suppress, she may be tried without violating the proscription against double jeopardy. (See *People v. Flatt* (1980), 82 Ill.2d 250, 265, 45 Ill.Dec. 158, 412 N.E.2d 509.) Accordingly, the cause is remanded to the circuit court of Madison County for a continuation of the trial. 451 N.E.2d at 984.

Despite this language, upon remand, the defendant filed a motion to dismiss the proceeding on grounds of former jeopardy. The trial court considered itself bound by this court's resolution of the question and denied the motion. Defendant appeals that denial pursuant to Supreme Court Rule 604(f) (87 Ill. 2d P. 604(f)). That rule states:

> "(f) The defendant may appeal to the Appellate Court the denial of a motion to dismiss a criminal proceeding on grounds of former jeopardy."

Thereafter, the State filed a motion to dismiss the appeal. Defendant filed a timely objection to the motion.

In essence, the State's argument is that under the doctrine of law of the case, this court's ruling on the jeopardy aspects of this case is entitled to *res judicata* effect and that this court's consideration of the issue in the previous appeal was more than adequate to dispose of defendant's right to appeal under Supreme Court Rule 604(f).

Supreme Court Rule 604(f) was adopted to provide a readily available mechanism for the review of denials of meritorious jeopardy claims prior to commencement of the retrial. Prior to

the rule's promulgation, such review was discretionary and was available only by means of a motion for leave to file an original petition for a writ of prohibition, mandamus or habeas corpus. (*People ex rel. Mosley v. Carey* (1979), 74 Ill.2d 527, 387 N.E. 2d 325.) With adoption of the rule, review of such decisions comes as a matter of right just as in appeals from final judgments of the circuit court pursuant to Supreme Court Rule 301 (87 Ill. 2d R. 301).

Defendant argues that to grant the State's motion to dismiss this appeal would deny her that right to a review of the denial of her motion to dismiss on grounds of former jeopardy.

The flaw in defendant's argument is that the right to review does not also embrace the right to have an appellate court which has already considered the issue to once again address that issue. Rule 604(f) entitles a defendant to appellate review of a claim of former jeopardy prior to retrial. Such has already been provided by this Court's decision in the first appeal. The issue of former jeopardy was presented in the prior appeal and was addressed in this court's opinion. The law of the case is that defendant may be tried without violating the proscription against double jeopardy. The appeal from the order of the trial court denying defendant's subsequent motion to dismiss the proceeding on grounds of former jeopardy is clearly frivolous and without merit.

IT IS THEREFORE ORDERED that the State's motion to dismiss the appeal in this cause be and hereby is granted and that this appeal be and hereby is dismissed.

IT IS FURTHER ORDERED that the mandate of this court be issued forthwith.

APPENDIX 6

Illinois Supreme Court
Juleann Hornyak, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

April 3, 1984

Mr. Donald E. Groshong
Groshong and Moorman
227 W. St. Louis Avenue
East Alton, IL 62024

No. 59782 - People State of Illinois, respondent, vs. Susan E. Davidson, petitioner. Leave to appeal, appellate Court, Fifth District.

The Supreme Court today *DENIED* the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 25, 1984.

APPENDIX 7

State of Illinois
Office of
Clerk of the Supreme Court
Springfield
62706

Julieann Hornyak
clerk

Telephone
area code 217
782-2035

April 27, 1984

Groshong and Moorman
Attorneys at Law
227 W. St. Louis Ave.
East Alton, IL 62024

THE COURT HAS THIS DAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 59782 - People State of Illinois, respondent, vs. Susan E. Davidson, petitioner.

The motion by petitioner for leave to file a motion for reconsideration of the order denying petition for leave to appeal is *denied.*

Petitioner's alternative request that this court certify that it considered and decided the federal constitutional issue concerning Rule 604(a)(1) is *denied.*

The mandate of this court has today issued to the Clerk of the Appellate Court, Fifth District.

JH:th
cc: AG - Criminal (Mark L. Rotert)

APPENDIX 8

No. 59782

IN THE
SUPREME COURT OF ILLINOIS

People of the State of Illinois,
Plaintiff-Appellee,

vs.

Susan E. Davidson,
Defendant-Appellant.

Appeal from the Appellate Court,
Fifth District, State of Illinois

No. 5-84-0057

Original Appeal from the Circuit
Court for the Third Judicial
Circuit, Madison County, Illinois

No. 79-CF-637

Hon. Charles V. Romani, Jr.,
Judge Presiding

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Susan E. Davidson, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of Illinois entered herein on April 27, 1984, denying reconsideration of the order denying appellant's Petition for Leave to Appeal to the Supreme Court of the State of Illinois from the order of the Appellate Court of Illinois, Fifth District, entered February 9, 1984, dismissing Appellant's appeal.

This appeal is taken pursuant to Title 28, *United States Code,* section 1257(2).

SUSAN E. DAVIDSON

By: Donald E. Groshong
Attorney for Appellant
Groshong & Moorman, Ltd.
227 West St. Louis Avenue
East Alton, IL 62024
(618) 254-0147

APPENDIX 9

IN THE CIRCUIT COURT
FOR THE THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

No. 79 CF 637

People of the State of Illinois,

vs.

Susan E. Davidson,
Defendant.

REPORT OF PROCEEDINGS
MOTION TO DISMISS

Report of Proceedings before the HONORABLE CHARLES ROMANI, JR., in the above-styled cause on the 20th day of January, 1984.

APPEARANCES

MR. MARK ROTERT
MS. MARCIA FRIEDL

Assistant Attorneys General, appearing on behalf of the People of the State of Illinois

MR. DONALD GROSHONG
MR. G. EDWARD MOORMAN

Attorneys at Law, appearing on behalf of the Defendant Susan E. Davidson

WHEREUPON:

THE COURT: Okay. This is People of the State of Illinois versus Susan E. Davidson. Matter comes before the Court on a Motion to Dismiss filed by the Defendant.

Present for the Defendant is Mr. Donald Groshong and Mr. G. Edward Moorman. Present for the People of the State of Illinois Assistant Attorney General Mark Rotert, Marcia Friedl, and Tony Ficarelli. (Phonetic spelling)

The Defendant—Let the record indicate the Defendant is not present.

Mr. Groshong, are you waiving the presence of the Defendant for the purposes of this motion?

MR. GROSHONG: That's correct.

THE COURT: Okay. Are you ready to proceed?

MR. GROSHONG: As far as I'm concerned.

MR. ROTERT: Yes, we are, Your Honor.

THE COURT: Mr. Groshong.

MR. GROSHONG: Thank you, Your Honor.

I previously had given a copy of the Motion in hand to the Attorney General. Basically what this Motion requests is that the instant cause and all counts thereof be dismissed as a matter of double jeopardy. A speedy trial point is also made.

Directing myself to the double jeopardy point the Motion makes it clear and the recollection of all is that this cause previously was called to trial and commenced trial and was in what we will call the mid-trial stage previously a couple years

ago where witnesses were sworn, the jury was impanelled and sworn, and opening statements were made, and that during the trial there was amistrial for the purposes of an interlocutory appeal by the State pursuant to Illinois Supreme Court Rule 604 and the authority of a couple of cases, *People versus Flatt* and *Young* which themselves talk about Rule 604 for that matter, but it is our position that notwithstanding Rule 604 trial is barred at this time by reason of double jeopardy.

First of all I don't think there's any question that jeopardy previously attached as a matter of record in this case. The question is whether retrial is permitted notwithstanding the attachment of jeopardy by reason of Supreme Court Rule 604 authorizing a—mid-trial appeals.

Our position is that the Supreme Court Rule 604 is unconstitutional on its face. Our position is that it is also unconstitutional and repugnant to the federal constitution as applied in this case because to permit a retrial or a second and subsequent trial after jeopardy has attached is repugnant to the federal constitution. So that we want it very clear that our position is that the Supreme Court rule itself is unconstitutional both on its face and as applied in that it is repugnant to the Fifth and Fourteenth Amendments to the Constitution of the United States.

It is also repugnant to collateral Illinois Constitution provisions that say the same thing essentially and are interpreted in the same way by our own Court and a couple statutes which are cited.

The point on speedy trial is made in the Motion. I don't think I need to elaborate on that. It's esseentially the same point shifting from the double jeopardy argument to a speedy trial point.

MS. FRIEDL: Your Honor, the Appellate Court specifically ruled on the double jeopardy issue in this case; that the last paragraph of the opinion addresses it, and the theory there is based on People versus—that was illustrated in *People versus Flatt* is that where the Defendant makes an untimely Motion to Suppress as in this case that that is the cause of the mistrial and double—and the Defendant is not then prohibited from being retried, and does—Your Honor, you have a copy of the Appellate Court's opinion?

THE COURT: I have read it. I don't have one with me right now.

MS. FRIEDL: Again they specifically address that issue and so does *People versus Flatt*.

MR. GROSHONG: My only response to that is that that point was never raised nor briefed in the—in the Appellate Court and that that single sentence in the final paragraph of the Appellate Court opinion is pure dicta.

MS. FRIEDL: Well, Your Honor, *People versus Flatt* did specifically address that and if I recall our briefs did discuss the double jeopardy issue. At page ten of our initial brief we addressed that issue and the Appellate Court agreed, and again even if you look at the Flatt case where the facts are substantially the same as here they specifically held that there is no double jeopardy prohibition.

With respect to the speedy trial 604 (a)(4) requires that the statute be—that the speedy trial term be tolled and it's for the same reason the same rational that otherwise the fact that there is no double jeopardy problem here where the Defendant is the cause of the—of the delay that time period will not be counted in the speedy trial term.

MR. GROSHONG: No further argument.

THE COURT: No further argument? Nothing further? Okay, the Court having heard arguments on the Motion to Dismiss based on the speedy trial and double jeopardy grounds as stated in the Motion the Court will deny the Motion to Dismiss finding that the statute is no unconstitutional.

MR. GROSHONG: Please the Court, at this time in light of that ruling we would file Notice of Appeal pursuant to Supreme Court Rule 604 (f). That is not in the hardbound volume by the way because it's so new.

(Whereupon, a discussion was held off the record.)

* * * * *

APPENDIX 10

MR. GROSHONG: I would also reiterate, of course, this is being done over the persistent objection of the defendant, herself.

THE COURT: Your position is that you want to proceed to trial?

MR. GROSHONG: That is correct. We object to any Mistrial; we object to any continuance; we are ready to go.

THE COURT: Okay. The Motion is made over the objection of the defendant; it is granted at the—by the Motion of the State; and, again, the Juror is withdrawn and a Mistrial is declared.

APPENDIX 11

Where the prosecution moves for mistrial *after* jeopardy has attached, however, the matter of double jeopardy is crucial. The State cites cases which held that mistrials attributable to the Defendant do not present double jeopardy problem. The mistrial in the instant case, however, can not be laid at the feet of Defendant. The appeal in this case is not consistent with the double jeopardy clause.

All Defendant did at trial was seek rulings on two evidentiary matters: whether certain exemplars were prejudicial, and whether certain testimony violated the attorney-client privilege. The Court ruled favorably to Defendant on these issues (C. 682-683; R. 1574-1576, 1618). The Defendant did not receive rulings at trial on motions to suppress based on illegal search and seizure, on involuntariness of a confession, on failure to furnish in discovery as in *Flatt* or on violations of state statute as in *Tomasello*. (R. generally).

State argues at page 4 of its brief that this case is not "particularly unusual", nor does it involve "unique legal issues". In one sense, this statement is patently untrue. The mere fact that the State wants to appeal this case mid-trial makes the case exceptional, considering the rarity of that situation. Also, where we have evidence developed by searches of lawyers safe deposit boxes, and by interviews with legal secretaries, we have unique factual problems.

In another sense, however, the State is correct. For the defense to object at trial that certain documents if introduced would be prejudicial beyond their probative value, or for the defense at trial to raise questions of attorney-client privilege is not unusual or unique at all. These are traditional evidentiary

considerations not in any sense involving "exclusionary rule" questions. These are not "motions to suppress". Moreover, these are matters which have never been held to be appealable by the State and have not been made so under the holdings of *Young* and *Flatt*. The rulings of the trial court in the instant case are not appealable by the State. The appeal should therefore be dismissed.

APPENDIX 12

12A

28 *United States Code* § 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

12B

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

12C

28 *United States Code* § 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for

review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

(June 25, 1948, c. 646, 62 Stat. 963.)

12D

Amendment [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

12E

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

12F

604. (Supreme Court Rule 604). Appeals from Certain Judgments and Orders

(a) Appeals by the State.

(1) *When State May Appeal.* In criminal cases the State may appeal only from an order or judgment the substantive effect of which results in dismissing a charge for any of the grounds enumerated in section 114-1 of the Code of Criminal Procedure of 1963;[1] arresting judgment because of a defective indictment, information or complaint; quashing an arrest or search warrant; or suppressing evidence.

12G

(f) The defendant may appeal to the Appellate Court the denial of a motion to dismiss a criminal proceeding on grounds of former jeopardy.

Amended June 15, 1982, eff. July 1, 1982; Aug. 9, 1983, eff. Oct. 1, 1983.

12H

315. (Supreme Court Rule 315). Leave to Appeal From the Appellate Court to the Supreme Court

(a) Petition for Leave to Appeal; Grounds. A petition for leave to appeal to the Supreme Court from the Appellate Court may be filed by any party, including the State, in any case not appealable from the Appellate Court as a matter of right. Whether such a petition will granted is a matter of sound judicial discretion....

121

114-12. Motion to suppress evidence illegally seized

§ 114-12. Motion to suppress evidence illegally seized.

(a) A defendant aggrieved by an unlawful search and seizure may move the court for the return of property and to suppress as evidence anything so obtained on the ground that:

(1) The search and seizure without a warrant was illegal; or

(2) The search and seizure with a warrant was illegal because the warrant is insufficient on its face; the evidence seized is not that described in the warrant; there was not probable cause for the issuance of the warrant; or, the warrant was illegally executed.

(b) The motion shall be in writing and state facts showing wherein the search and seizure were unlawful. The judge shall receive evidence on any issue of fact necessary to determine the motion and the burden of proving that the search and seizure were unlawful shall be on the defendant. If the motion is granted the property shall be restored, unless otherwise subject to lawful detention, and it shall not be admissible in evidence against the movant at any trial.

(c) The motion shall be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion. If the motion is made during trial, and the court determines that the motion is not untimely, and the court conducts a hearing on the merits and enters an order suppressing the evidence, the court shall terminate the trial with respect to every defendant who was a party to the hearing and who was within the scope of the order of suppression, without further proceedings, unless the State files a written notice that there will be no interlocutory appeal from such order of sup-

pression. In the event of such termination, the court shall proceed with the trial of other defendants not thus affected. Such termination of trial shall be proper and shall not bar subsequent prosecution of the identical charges and defendants; however, if after such termination the State fails to prosecute the interlocutory appeal until a determination of the merits of the appeal by the reviewing court, the termination shall be improper within the meaning of subparagraph (a)(3) of Section 3-4 of the "Criminal Code of 1961", approved July 28, 1961, as amended,[1] and subsequent prosecution of such defendants upon such charges shall be barred.

(d) The motion shall be made only before a court with jurisdiction to try the offense.

(e) The order or judgment granting or denying the motion shall state the findings of facts and conclusions of law upon which the order or judgment is based.

Amended by P.A. 79-1360, § 26, eff. Oct. 1, 1976.

[1] Paragraph 3-4 of this chapter.

Office-Supreme Court, U.S.
FILED
AUG 27 1984
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-137

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SUSAN E. DAVIDSON,

Appellant,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS

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34 pp

QUESTIONS PRESENTED

1. Whether this appeal should be dismissed because it is not timely filed?

2. Whether this appeal should be dismissed where it raises no substantial federal constitutional question which merits review by this Court?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
MOTION TO DISMISS:	
I.	
THE APPELLANT'S NOTICE OF APPEAL WAS NOT TIMELY	2
II.	
ILLINOIS SUPREME COURT RULE 604 HAS BEEN APPLIED IN THIS CASE IN A FASHION CONSISTENT WITH THE DOUBLE JEOPARDY CLAUSE	7
CONCLUSION	13
APPENDIX: Opinion by the Supreme Court of Illinois in *People v. Flatt*, 82 Ill. 2d 250, 412 N.E.2d 509 (1980)	1a

TABLE OF AUTHORITIES

Cases	PAGE
Abney v. United States, 431 U.S. 651 (1977) ..	6
Arizona v. Washington, 434 U.S. 497 (1978) ...	11, 12
Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949)	6
Illinois v. Sommerville, 410 U.S. 458 (1973) ...	11
People v. Flatt, 82 Ill. 2d 250, 412 N.E.2d 509 (1980)	*passim*
People v. Rogers, 79 Ill. Dec. 73, 463 N.E.2d 211 (3d Dist. 1984)	9
People v. Young, 82 Ill. 2d 234, 412 N.E.2d 501 (1980)	3, 4
United States v. Appawoo, 553 F.2d 1242 (10th Cir. 1977)	10
United States v. DiFrancesco, 449 U.S. 117 (1980) .	12
United States v. Jorn, 400 U.S. 470 (1971)	11, 12
United States v. Mara, 410 U.S. 19 (1973)	2, 3
United States v. Martin Linen Supply Co., 430 U.S. 564 (1977)	10
United States v. Moore, 613 F.2d 1029 (C.A.D.C. 1979)	10
United States v. Perez, 9 Wheat. 579 (1824) ...	10
United States v. Rogers, 475 F.2d 821 (7th Cir. 1973)	3
United States v. Scott, 437 U.S. 82 (1978)	8, 12
United States v. Wilson, 420 U.S. 332 (1975) ..	9
Wade v. Hunter, 336 U.S. 684 (1949)	10, 11

In The

Supreme Court of the United States

October Term, 1983

SUSAN E. DAVIDSON,

Appellant,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS

The appellees, the People of the State of Illinois, now move that this Court dismiss the appeal of appellant Susan E. Davidson. They so move because: 1) the appeal was not timely filed with this Court as required by the Court's Rule 11.1; and 2) the appeal does not present a substantial federal question worthy of review by this Court, inasmuch as the rulings by the Illinois courts which are at issue have been correctly decided as a matter of law. In support of these motions, which are brought pursuant to Supreme Court Rule 16.1(a) and (b), the appellees submit the following Argument.

I.

THE APPELLANT'S NOTICE OF APPEAL WAS NOT TIMELY

On January 8, 1982, prosecutors for the State of Illinois and the appellant, Susan Davidson, assembled in the Circuit Court of Madison County, Illinois, to begin trial in the defendant's case, *People v. Davidson*, wherein Davidson was charged with murder. A jury was empanelled and sworn, opening statements were given, and testimony was received from prosecution witnesses.

The prosecution's case was centered upon a group of handwritten letters; in opening statement the prosecutor announced an intent to introduce these letters into evidence. He further stated that the letters demonstrated the defendant's role in a successful conspiracy to murder the victim, her husband. The prosecutor told the jury that the government had submitted exemplars of the defendant's handwriting to a questioned documents examiner, and the jury was further informed that this expert witness would testify to his conclusion that defendant was the author of the incriminating letters.

Trial continued as the prosecution called witnesses. The fourth witness summoned was a police officer who had been present when the defendant, in the presence of her attorney and pursuant to court order, filled out a series of handwriting exemplars. These exemplars were then tendered for expert analysis by the questioned documents examiner. However, when the prosecution moved for admission of the exemplars into evidence, the defendant objected on grounds that the exemplars violated her fifth amendment privilege against self-incrimination.

This objection was, of course, absolutely without merit as a matter of law. *United States v. Mara*, 410 U.S. 19

(1973); *United States v. Rogers*, 475 F.2d 821 (7th Cir. 1973). More to the point, however, the objections were untimely as a matter of Illinois law and procedure, and the trial court was without authority to entertain the motion mid-trial. *People v. Flatt*, 82 Ill. 2d 250, 412 N.E.2d 509 (1980). Citing *Flatt*, the prosecution urged to the trial court that it lacked the authority, as a matter of Illinois law, to suppress evidence on constitutional grounds in the midst of trial. The trial court nevertheless granted appellant's motion and suppressed the evidence, thereby precluding the prosecution from tendering the exemplars to the expert witness on handwriting. This, in turn, prevented the state from demonstrating defendant's authorship of the prosecution's most crucial evidence—the letters themselves.

Based on two recent opinions of the Illinois Supreme Court in companion cases (*People v. Flatt, supra*; *People v. Young*, 82 Ill. 2d 234, 412 N.E.2d 501 (1980)), the prosecutor initially requested a mistrial to enable him to seek appellate review of the trial court's wholly unauthorized ruling. However, the prosecutor later withdrew that motion and offered defendant a compromise solution: both parties would agree to a brief continuance, defendant would execute a new set of exemplars using language which satisfied her alleged fifth amendment concerns, these exemplars would be submitted for expert comparison with the letters, and the questioned documents examiner would testify to his conclusion.

Defendant flatly refused to accede to this compromise procedure. The prosecutor then faced the following Hobson's Choice:

> 1) he could continue the trial to verdict, deprived of his most critical evidence of guilt by virtue of an unauthorized, untimely ruling which was incorrect as a matter of both law and procedure; or

> 2) he could follow the teachings of the Illinois Supreme Court by seeking the opportunity to have an appellate court rectify the trial court's improper ruling.

The prosecutor chose the latter course. A mistrial was declared at his request. He then certified to the Illinois Appellate Court, Fifth District, that the trial court's ruling substantially impaired his ability to prosecute the case. *See People v. Young, supra.*

Notice of appeal having been filed, both sides briefed the case in the Appellate Court. In their briefs, both parties devoted considerable energy to the issue of whether defendant could ever be tried again without violating double jeopardy.

On July 8, 1983, the Illinois Appellate Court vacated the trial court's ruling. *See* Appendix to Appellant's Jurisdictional Statement in Case 84-137, pp. A-1 to A-13. That Court held the defendant's motion "collateral to a determination of [her] guilt or innocence . . . [which] was untimely under [Ill. Rev. Stat., ch. 38,] section 114-12(c) . . .". The Court, therefore, vacated the suppression order. In closing, the Court stated:

> In view of the result reached, we need not consider the State's other assertions of error, although a brief comment on the double jeopardy aspect of this case is appropriate. Because the mistrial was triggered by the defendant's untimely motions to suppress, she may be tried without violating the proscription against double jeopardy. (See *People v. Flatt* (1980), 82 Ill. 2d 250, 265, 45 Ill. Dec. 158, 412 N.E.2d 509.) Accordingly, the cause is remanded to the circuit court of Madison County for a continuation of the trial.

Defendant Davidson next sought leave to appeal to the Illinois Supreme Court. As part of her petition for leave

to appeal, she again raised a double jeopardy argument. On October 4, 1983, the Illinois Supreme Court denied leave to appeal. *See* Juris. Stmt., Appendix 2, p. A-14.

In January of 1984 the prosecution again appeared in Madison County Circuit Court, prepared to resume trial in this case. However, the defendant instead filed a motion to dismiss the charges against her on double jeopardy grounds. Appellant's Juris. Stmt., Appendix 3, pp. A-15 to A-18. The trial court denied that motion. *Id.* at A-19. When defendant filed a notice of appeal from this ruling (*see* Ill. Rev. Stat., ch. 110A, par. 604(f)), the prosecution moved to dismiss the appeal in the Illinois Appellate Court and pointed out to that Court that defendant had previously raised her double jeopardy argument in the prior appellate proceedings.

The Illinois Appellate Court agreed, and dismissed defendant's appeal. In doing so, the Court observed:

> The issue of former jeopardy was presented in the prior appeal and was addressed in this court's opinion. The law of the case is that defendant may be tried without violating the proscription against double jeopardy. The appeal from the order of the trial court denying defendant's subsequent motion to dismiss the proceeding on grounds of former jeopardy is clearly frivolous and without merit.

App. Juris. Stmt., Appendix 5, p. A-22. The Illinois Supreme Court thereafter denied defendant's petition for leave to appeal from the Appellate Court's dismissal of this appeal. *Id.* at App. 6, p. A-23.

The appellees have indulged in this concededly tortuous procedural history to illustrate their first contention: appellant's appeal has not been timely filed. Once mistrial was declared in February, 1982, both parties recognized that retrial would implicate double jeopardy concerns. In-

deed, Davidson raised double jeopardy arguments throughout the course of the initial appellate litigation in the Illinois Appellate and Supreme Courts. Those arguments were explicitly rejected by both courts, and they were rejected on the basis of Illinois Supreme Court Rule 604 (Ill. Rev. Stat., ch. 110A, par. 604) as construed by the opinion in *People v. Flatt, supra.* Thus, once the Illinois Supreme Court denied leave to appeal from the initial Appellate Court opinion (Appendix 2, p. A-14) on October 4, 1983, the appellant was possessed of an appealable order for the purposes of 28 U.S.C. § 1257(2), or at the very least, of an order reviewable by *certiorari* under 28 U.S.C. § 1257(3). *Cf. Abney v. United States,* 431 U.S. 651 (1977); *Cohen v. Beneficial Loan Corp.,* 337 U.S. 541, 546 (1949). Thus, appellant should have sought review of the Illinois courts' decisions within either 60 days (Rule 11.1, Rules of Practice of the Supreme Court of the United States) or 90 days (*id.,* Rule 20.1) of October 4, 1983. This she failed to do, opting instead to file a motion which the Illinois Appellate Court properly labelled "clearly frivolous and without merit." Appendix 5, p. A-22. The double jeopardy claim which appellant urges this Court in July of 1984 "was presented in the prior [1982] appeal and was addressed in [that prior] opinion." *Id.* The same *res judicata* bar which precluded the Illinois Appellate Court from addressing appellant's double jeopardy argument on her second "appeal" provides the basis for appellees' argument before this Court: appellant has already had an opportunity to seek review from this Court of the double jeopardy rulings contained within the Illinois Appellate Court's 1983 opinion. For some reason, she elected to forego that right and opted instead to raise an obviously futile motion in the trial court in January of 1984. Whatever may have motivated this choice is plainly irrelevant; appellant's request for review by this Court is untimely.

Accordingly, this Court should dismiss her appeal as expeditiously as possible, thereby enabling the People of the State of Illinois to bring her to trial on charges arising from a 1979 homicide.

II.

ILLINOIS SUPREME COURT RULE 604 HAS BEEN APPLIED IN THIS CASE IN A FASHION CONSISTENT WITH THE DOUBLE JEOPARDY CLAUSE

Assuming *arguendo* that appellant's appeal is brought to this Court in a timely fashion, the appeal should nonetheless be dismissed. The appellant urges that Illinois' application of its Supreme Court Rule 604 (Ill. Rev. Stat. 1984, ch. 110A, par. 604) is an "eccentricity." Juris. Stmt., p. 10. That, of course, in no way indicates that the Rule is unconstitutional, even if it were an accurate assertion. In point of fact, however, the Illinois Rule parallels a federal statute governing governmental appeals (18 U.S.C. § 3731); Illinois construes Rule 604 in a fashion consistent with federal treatment of § 3731; and Illinois' application of Rule 604 in the context of this appeal is entirely proper under the United States Constitution.

A few matters merit preliminary consideration. First, it is simply not true that the prosecution's mistrial and appeal in this case were designed "merely to enable the State to appeal adverse evidentiary rulings." Juris. Stmt., p. 13. Rather, from the very outset of those proceedings until the present, the prosecution has consistently argued that the defendant's mid-trial motion to suppress the handwriting exemplars was untimely as a matter of Illinois law, and that *ergo* the trial court was without the authority to grant the suppression motion in the midst of a jury trial. Thus, when the Illinois Appellate Court

decided the initial appeal, no discussion was had as to the *merits* of the suppression ruling; the Court's opinion is devoted exclusively to discussions of the court's lack of authority to rule on an untimely motion. *Id.* at App. 1, pp. A-1 to A-13. That construction of Illinois law and procedure is, of course, binding upon this Court.

Secondly, appellant persists in arguing to this Court, as she argued to the Illinois courts, that the trial judge's ruling was a "mere evidentiary ruling" instead of a "suppression" of evidence. The Illinois Appellate Court explicitly rejected that contention, holding "the record does not support defendant's interpretation of the trial court's orders." *Id.* at p. A-10. This factual determination, amply supported by the record, is also entitled to the greatest deference by this Court. *Cf.*, 28 U.S.C. § 2254(d).

Third, the guiding principles followed by the prosecution throughout this case are set forth by the Illinois Supreme Court in the case *People v. Flatt*, 82 Ill. 2d 250, 412 N.E.2d 509 (1980). Because this opinion is well-reasoned and correct in its pronouncements on these issues, and because of the pivotal role it plays in this case, appellees have included the text of the opinion as an Appendix to this Motion. Illinois Supreme Court Rule 604(a)(1), also central to these issues, is set forth verbatim in the body of the *Flatt* opinion.

The Double Jeopardy Clause has generated a great deal of appellate litigation before this Court in recent decades, and much of that case law has been in response to the expanded availability of governmental appeals in criminal cases. *See, e.g., United States v. Scott*, 437 U.S. 82 (1978). In Illinois, Supreme Court Rule 604(a)(1) governs the question of when the state may seek appeal in a criminal case. Simply stated, Rule 604 allows for a state appeal so long

as the appeal would not contravene the Double Jeopardy Clause. *Flatt, supra,* 412 N.E.2d at 512. Federal law is essentially the same. *United States v. Wilson,* 420 U.S. 332, 337 (1975); 18 U.S.C. § 3731.

The *Flatt* opinion, however, directly addresses the unique circumstances present in this case, i.e., the availability of an appeal to the State *after* jeopardy has attached. That opinion allows state appeals in very strictly limited circumstances: when a trial court erroneously entertains an untimely motion to suppress evidence on constitutional grounds mid-trial, and "suppresses" evidence without authority under Illinois law, the state may seek appellate correction of such unauthorized rulings. However, it bears repeating that *Flatt* only allows for review of the authority of the trial court's actions, not the merits of the ruling itself. 412 N.E.2d at 516. The Illinois Supreme Court's stated policy reason for this ruling is twofold: 1) because the state could not appeal an acquittal, such unauthorized rulings could escape review, a situation inimical to the development of the law; and 2) it is a disservice to the cause of justice to require the state to suffer at the hands of erroneous, unauthorized rulings without recourse. *Id.*

Moreover, experience teaches that the *Flatt* doctrine hardly grants a prosecutor the *carte blanche* right to appeal "mere evidentiary rulings" in derogation of the Double Jeopardy Clause. An Illinois prosecutor who attempts such a piecemeal appellate ruling will find his case dismissed on Double Jeopardy grounds. *People v. Rogers,* 79 Ill. Dec. 73, 463 N.E.2d 211 (3d Dist. 1984). Accordingly, while Illinois allows for mid-trial appeals by the state after jeopardy attaches, any prosecutor seeking such review must risk dismissal of his appeal unless he: 1) certifies that the erroneous ruling substantially impairs his

ability to try the case, and 2) it can be demonstrated that the trial court's ruling was the unauthorized result of a defendant's untimely motion to suppress. If either claim is found invalid on review, the prosecutor faces a Double Jeopardy bar to further proceedings. By effectuating the policies announced in *Flatt* through this narrowly circumscribed procedure, the Supreme Court of Illinois has assured that mid-trial appeals by the state will only be available in cases where there is a demonstrable and manifest necessity for the termination of trial. *See United States v. Perez*, 9 Wheat. 579, 580 (1824).

Similarly, the United States allows the federal government to bring appeals mid-trial in criminal cases, after jeopardy attaches, where the government certifies that a trial court has made erroneous rulings on matters unrelated to guilt of innocence, based on a motion raised by the defendant, so long as the court's ruling on the motion "did not resolve in [defendant's] favor any of the factual elements of the offense." *United States v. Moore*, 613 F.2d 1029, 1038 (C.A.D.C. 1979); *United States v. Appawoo*, 553 F.2d 1242 (10th Cir. 1977). The appellees submit that, for purposes of the Double Jeopardy Clause, these rulings under 18 U.S.C. § 3731 as reflected by *Moore* and *Appawoo* are constitutionally indistinguishable from the construction of Rule 604 found in *Flatt*. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 576-581 (1977) (Stevens, J., concurring).

A great portion of the appellant's argument hinges on her complaints that she has lost her "valued right to have [her] trial completed by a particular tribunal", quoting *Wade v. Hunter*, 336 U.S. 684 (1949). However,

> (t)his description of the right, which was quoted by Mr. Justice Harlan in his plurality opinion in *United States v. Jorn*, 400 U.S. 470, 484, 91 S.Ct. 547, 557,

> 27 L.Ed.2d 543 and by the Court in *Illinois v. Somerville*, 410 U.S. 458, 466, 93 S.Ct. 1066, 1071, 35 L.Ed.2d 425, was formulated by Mr. Justice Black in his opinion for the Court in *Wade v. Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed.2d 974. His complete sentence identifies that right as *sometimes subordinate to a larger interest in having the trial end in a just judgment*:
>
> "What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Ibid.*

Arizona v. Washington, 434 U.S. 497, 503, fn. 11 (1978) (emphasis supplied).

As the constitutional doctrines of double jeopardy law evolve, this Court has continually recognized that there can and should be no mechanistic formula or rule to govern all questions raised under the Clause; rather, the Court has cautioned that specific issues must be resolved on their individual facts. *United States v. Jorn*, 400 U.S. 470 (1971). "Federal courts should not be quick to conclude that simply because a state procedure does not conform to the corresponding federal statute or rule, it does not serve a legitimate state policy." *Illinois v. Somerville*, 410 U.S. 458, 467 (1973). The Illinois Supreme Court in *Flatt* clearly outlined the legitimate state policies it wished to further in its construction of Rule 604(a)(1). As did Mr. Justice Harlan, the Illinois Supreme Court recognized the need to balance a defendant's valued right to the judgment of a particular tribunal with society's undeniably legitimate interest in receiving just judgments from its courts.

Thus, when appellant insists that her re-trial must be barred on double jeopardy grounds, she "place(s) an un-

warrantedly great emphasis on the defendant's right to have [her] guilt decided by the first jury empaneled to try [her] . . .". *United States v. Scott*, 437 U.S. 82, 87 (1978). The fact of the matter is, as found by the Illinois Appellate Court (Juris. Stmt., Appendix 1, p. A-13), that the appellant herself "triggered" the mistrial by the filing of an untimely motion. Thus, her actions in creating error obviate any claim that she may not be re-tried simply because she objected to the grant of the mistrial; that simply is not the state of the law. *Cf.*, *United States v. Jorn*, 400 U.S. 470, 489 (1971) (Burger, C.J., concurring). Nor does it make any difference that, in declaring a mistrial, the trial court did not recite the phrase "manifest necessity." *Arizona v. Washington, supra.* The necessity for such a mistrial declaration is quite amply explicated in *Flatt* and is demonstrated in a concrete fashion by the facts of this very case.

Accordingly, appellees urge that the appellant may now be tried for the murder of her husband in 1979, because the termination of her first trial was occasioned by her untimely actions, and the manifest need for appellate review of the trial court's unauthorized rulings which resulted therefrom removes any double jeopardy bar to that trial. *United States v. DiFrancesco*, 449 U.S. 117 (1980). As such, appellants move that this appeal be dismissed as expeditiously as possible to enable the People of the State of Illinois to finally receive a fair trial for a homicide occurring in 1979. As a matter of constitutional law, and as a matter of public concern for prompt justice, this appeal must be dismissed.

CONCLUSION

Wherefore, the appellees, the People of the State of Illinois, respectfully move that the appeal be dismissed because it was not timely filed, or in the alternative, because it raises no substantial federal question worthy of review by this Court.

Respectfully submitted,

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APPENDIX

(No. 52621.—Vacated and remanded.)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. ANDREW FLATT, Appellant.

Opinion filed October 17, 1980.—Rehearing denied November 26, 1980.

Appeal from the Appellate Court for the Third District; heard in that court on appeal from the Circuit Court of Peoria County, the Hon. Stephen J. Covey, Judge, presiding.

Robert Agostinelli, Deputy Defender, and Michael Filipovic, Assistant Defender, of the Office of State Appellate Defender, of Ottawa, for appellant.

William J. Scott, Attorney General, of Springfield, and Michael M. Mihm, State's Attorney, of Peoria (Donald B. Mackay and Neal B. Goodfriend, Assistant Attorneys General, of Chicago, and John X. Breslin, of the State's Attorneys Appellate Service Commission, of Ottawa, of counsel), for the People.

MR. JUSTICE RYAN delivered the opinion of the court:

This case involves the right of the State to appeal from an interlocutory order in a criminal case. Specifically, the question presented is whether the trial court order appealed from was an order "suppressing evidence" and, therefore, appealable by the State by virtue of our Rule

604(a)(1). (73 Ill. 2d R. 604(a)(1).) A similar question is involved in *People v. Young* (1980), 82 Ill. 2d 234, also decided today. In *Young,* however, the suppression order was entered before the trial had commenced. In our case, the suppression order was entered after the jury had been sworn to try the issues.

On August 30, 1977, the Peoria residence of Patricia Ring was broken into. According to an investigation conducted by the Peoria Police Department, the perpetrator had entered the house by kicking open a basement door. Several pictures from the kitchen were taken. Also, a large stained-glass window from the living room was removed from the premises. The leaded window had been pried from its casing after the protective plate-glass window was broken and removed. Latent fingerprints and palm prints were taken from the broken plate glass at the scene of the crime by Peoria Police Department Officer Gary Siebenthal. The glass was not taken into police custody and, presumably, it was later disposed of by Ring. In a Peoria Police Department laboratory report dated October 20, 1977, the latent palm print developed from the glass was positively identified by Officer Siebenthal as being defendant's left palm. Defendant was charged by a Peoria County grand jury indictment on December 6, 1977, with burglary in violation of section 19—1(a) of the Criminal Code of 1961 (Ill. Rev. Stat. 1977, ch. 38, par. 19—1(a)).

A public defender was appointed for the defendant on December 8, 1977, and the State was ordered to furnish discovery. In its answer for discovery dated December 9, 1977, the State represented, *inter alia,* that the tangible objects it intended to use at trial were available at the Peoria County State's Attorney's office. Due to a conflict of interest, the assistant public defender was granted leave to withdraw on February 20, 1978, and a private attorney, Ronald Halliday, was appointed by the court

to represent the defendant. At some point thereafter, Halliday met with Officer Siebenthal and an assistant State's Attorney at the State's Attorney's office for the purpose of obtaining discovery of the physical evidence. The piece of glass from which the prints were lifted was not produced at that meeting. A pretrial conference was also held. The record does not indicate whether the discovery meeting was conducted prior to the pretrial conference. It is clear, however, that the trial judge was not informed during that conference that, as claimed by defendant, discovery was incomplete and that the glass should have been delivered. Instead, defense counsel announced his readiness for trial.

On March 9, 1978, the date of trial, defense counsel presented a motion to produce physical evidence, seeking the broken plate-glass window which allegedly contained the latent print of defendant's palm. According to the defense, the State's failure to produce the glass for defendant's independent examination violated defendant's constitutional right to confront material evidence presented against him. In view of the late date at which Halliday had been appointed to represent defendant, the State waived its right to challenge the timeliness of the motion. Following arguments by counsel, the trial court granted defendant's motion to produce. The State informed the court as to the possible unavailability of the glass, and the court indicated that such failure to produce the glass would result in a suppression of fingerprint evidence at the trial. The jury was then impaneled pursuant to the court's suggestion that the parties proceed with the case until the State determined whether the glass was available for discovery.

Immediately after the jury was sworn, the State advised the court that the glass was unavailable. A proceeding was conducted outside of the presence of the jury. The hearing was apparently held on the State's

motion to reconsider the court's ruling granting defendant's motion to produce physical evidence. Officer Siebenthal was called by the State to testify as to the disposition of the plate glass. He stated that the plate-glass window measured 48 by 48 inches and that the piece of glass removed by the perpetrator in order to reach the stained-glass window was approximately one-half that size. He further stated that he lifted the latent prints on August 31, 1977, while the glass was at the scene of the crime; the glass was at no time transported to the Peoria Police Department. Leaving the large piece of glass at the scene was, according to the officer, consistent with departmental procedure followed in burglary cases in order to avoid congesting the department's property room. It was Officer Siebenthal's belief that the glass was subsequently disposed of by Ring. No other evidence was presented by either party. The court stood by its earlier ruling, stating that the failure to produce the glass would result in a deprivation of defendant's due process right to confront evidence presented against him. The court indicated that all fingerprint evidence would therefore be suppressed. The State advised the court that the only motion before the court was one to produce physical evidence. After much discussion among the attorneys and the court, it was agreed that defendant's attorney would file a motion *in limine* as a motion to suppress any fingerprint evidence. Noting that this motion was to be made during the trial and having been assured by the State that it would appeal, the court, in view of the procedures outlined in section 114—12(c) of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1977, ch. 38, par. 114—12(c)), discharged the jury. Thereafter defendant's motion *in limine* to suppress the fingerprint evidence was filed. An order was entered, dated March 16, 1978, granting defendant's motion and terminating the trial pursuant to the State's motion to file an interlocutory appeal. The appellate

court, with one justice dissenting, reversed and remanded. (75 Ill. App. 3d 930.) We granted defendant's petition for leave to appeal.

In this court, defendant asserts that the appellate court wrongfully entertained an appeal from the March 16, 1978, order. Citing *People v. Van De Rostyne* (1976), 63 Ill. 2d 364, defendant contends that the order entered was not an order suppressing evidence under Rule 604(a)(1) (73 Ill. 2d 604(a)(1)) since the evidence was neither obtained in an illegal search and seizure nor elicited in an involuntary confession. Citing *People v. Alfano* (1980), 78 Ill. 2d 434, defendant argues in the alternative that the order was not an order of suppression since the evidence was not obtained in violation of the exclusionary rule. Thus, according to defendant, under either *Van De Rostyne* or *Alfano*, the order entered was an order excluding evidence from which the State may not be permitted to appeal by virtue of Supreme Court Rule 604(a)(1).

The Illinois Constitution of 1970 provides in article VI, section 6, that after a trial on the merits in a criminal case there shall be no appeal from a judgment of acquittal, and it further provides:

> "The Supreme Court may provide by rule for appeals to the Appellate Court from other than final judgments of Circuit Courts." (Ill. Const. 1970, art. VI, sec. 6.)

Our Rule 604(a)(1) provides for appeals by the State in criminal cases:

> "(1) *When State May Appeal.* In criminal cases the State may appeal only from an order or judgment the substantive effect of which results in dismissing a charge for any of the grounds enumerated in section 114—1 of the Code of Criminal Procedure of 1963; arresting judgment because of a defective indictment, information or complaint; quashing an arrest or search warrant; or *suppressing evidence.*" (Emphasis added.) (73 Ill. 2d R. 604(a)(1).)

There has been considerable litigation concerning the

nature of the rulings of the trial court that are appealable by the State under this rule, particularly as it relates to orders "suppressing evidence." In one line of cases, the courts have stated that the appealability of such orders turns on whether the trial judge believes that the effect of his ruling will be to block the prosecution entirely. (*People v. Shipp* (1968), 96 Ill. App. 2d 364, 366; *People v. Koch* (1973), 15 Ill. App. 3d 386, 388.) (But see *People v. Smith* (1972), 5 Ill. App. 3d 642, 643 (right to appeal does not require the State to show it would have insufficient evidence to proceed with the prosecution).) The test enunciated in this line of cases was expressly rejected in *People v. Van De Rostyne* (1976), 63 Ill. 2d 364, 368. (See also *People v. Lara* (1976), 44 Ill. App. 3d 116, 124.) In another line of cases, a distinction is made between orders suppressing evidence and mere evidentiary rulings. According to these cases, only the former are deemed to be appealable under the Rule. *People v. Thady* (1971), 133 Ill. App. 2d 795; *People v. Wheatley* (1972), 5 Ill. App. 3d 827; *People v. Koch* (1973), 15 Ill. App. 3d 386, 389; *People v. Macaluso* (1976), 36 Ill. App. 3d 592, 594; *People v. Young* (1978), 60 Ill. App. 3d 49, 56.

While we agree that it is suppression orders, as distinguished from evidentiary rulings, that are appealable by virtue of Rule 604, we recognize the difficulty involved in defining that which constitutes an order of suppression. In *People v. Thady* (1971), 133 Ill. App. 2d 795, the State attempted to appeal from an order suppressing testimony relating to a breath-analysis test. The court held the order to be an evidentiary ruling and not appealable. The appellate court stated that the court's rulemaking authority was limited by the legislature. Finding only two statutory provisions concerning the suppression of evidence, the court held that the State's ability to appeal from orders granting motions to suppress was limited to those orders entered pursuant to either section 114–11 (involuntary

confessions) or section 114—12 (illegal search and seizure) of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1969, ch. 38, pars. 114—11, 114—12). Since the evidence obtained in *Thady* was neither illegally obtained nor an involuntary confession, and "a rule can have no broader scope than the statute which gave it birth (133 Ill. App. 2d 795, 797), the order was not one from which the State could take an appeal under Rule 604(a)(1).

It is clear that in the *Thady* case the court was of the opinion that the State's right to appeal was a narrow one which could not be expanded by a rule of this court beyond the specific statutory language. *Thady* states that this court was authorized by section 120—1 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1967, ch. 38, par. 120—1) to make rules for appeals by the State. Although the court in that case acknowledged that section 120—1 was repealed, it, nonetheless, felt that the rule-making power was found in the Civil Practice Act, section 2 of which (Ill. Rev. Stat. 1969, ch. 110, par. 2) granted to this court power "to make rules 'supplementary to *but not inconsistent with*' the Act." (Emphasis in *Thady*.) (133 Ill. App. 2d 795, 797.) It therefore considered the scope of the appeal, which this court authorized by our Rule 604, to be limited by statutory provisions. Since the court found only two provisions in the statutes (sections 114—11 and 114—12 of the Code of Criminal Procedure of 1963) governing suppression of evidence, it considered the scope of review under our Rule 604 limited by those sections. We do not here consider the validity of the reasoning in *Thady*. Section 120—1 of the Code of Criminal Procedure of 1963 has been repealed, and under the 1970 Constitution this court's authority to provide for appeals from other than final orders is derived not from statutes but from article VI, section 6, of the 1970 Constitution, and this authority is not limited or curtailed by section 2 of the Civil Practice Act. The scope of appeals

from orders suppressing evidence as authorized by Rule 604(a)(1) need not therefore be limited by the provisions of sections 114–11 and 114–12 of the Code of Criminal Procedure of 1963.

In his brief, defendant contends that in *People v. Van De Rostyne* (1976), 63 Ill. 2d 364, this court held, consistent with *Thady*, that the State's right to appeal from suppression orders was limited to orders entered pursuant to the two statutory provisions mentioned above. Several appellate court opinions have also interpreted *Van De Rostyne* in this manner. (*People v. Lara* (1976), 44 Ill. App. 3d 116, 124; *People v. Eddington* (1977), 47 Ill. App. 3d 388, 389; *People v. Young* (1979), 76 Ill. App. 3d 210, 212, *vacated and remanded* (1980), 82 Ill. 2d 234; *People v. Phipps* (1979), 79 Ill. App. 3d 532, 536.) (But see *People v. Stuckey* (1979), 78 Ill. App. 3d 1085.) While we recognize that there is language in the *Van De Rostyne* opinion which may support such an interpretation, we do not view the *Van De Rostyne* case as so limiting the State's right to appeal.

In *Van De Rostyne* the defendant, charged with driving while intoxicated, filed a motion to suppress the results of a breathalyzer test after the jury had been impaneled. Evidence concerning the method used in administering the test was then taken outside the presence of the jury, and the defendant's motion was granted. The State informed the court of its desire to appeal from the ruling, and the court declared a mistrial. On appeal, the defendant conceded that the test had been properly conducted but he filed a motion to dismiss, claiming that the court lacked jurisdiction to entertain the appeal. The appellate court denied the motion to dismiss and, addressing the merits of the case, found that the trial court erred in suppressing the breathalyzer-test evidence. On appeal this court held that the appellate court had erred in its finding of appellate jurisdiction to entertain the

merits of the appeal. Noting that defendant's motion to suppress was made subsequent to the commencement of trial, this court found the State's right to appeal depended on section 114—12(c) of the Code of Criminal Procedure of 1963, which deals with motions to suppress illegally seized evidence. It provides that such motions should be made before trial, but it also provides that, under certain circumstances, such motions may be made during trial; it states:

> "If the motion is made during trial, and the court determines that the motion is not untimely, and the court conducts a hearing on the merits and enters an order suppressing the evidence, the court shall terminate the trial *** without further proceedings, unless the State files a written notice that there will be no interlocutory appeal from such order of suppression." (Ill. Rev. Stat. 1977, ch. 38, par. 114—12(c).)

Since the evidence was not the result of an illegal search and seizure, as is required under section 114—12(c), this court in *Van De Rostyne* held that the procedures set forth in paragraph (c) for interrupting the trial for appellate review of the suppression order would not govern the case. Reluctant to allow the defendant to profit from the erroneous labeling of the motion filed during trial as a motion to suppress, this court vacated the order granting the motion to suppress and declaring a mistrial. This court remanded the cause for trial.

The facts in *Van De Rostyne* presented a situation where the State, under the procedure set out in section 114—12(c), sought to appeal from an order entered pursuant to a motion presented during trial to suppress *legally* obtained evidence. It is well settled that the precedential scope of a decision is limited to the facts before the court. (See, *e.g.*, *People v. Beard* (1974), 59 Ill. 2d 220, 225, *cert. denied* (1975), 421 U.S. 992, 14 L. Ed. 2d 483, 95 S. Ct. 1999; *People v. Arndt* (1971), 49 Ill. 2d 530, 533.) Thus *Van De Rostyne* holds only that an appeal

from the merits of a court's ruling on a motion to suppress evidence which was filed during trial may be had only if it is alleged that said evidence was illegally obtained. We therefore cannot accept defendant's interpretation of *Van De Rostyne* as defining all appealable suppression orders under Rule 604 as those entered either under section 114—11 or section 114—12. In *People v. Young* (1980), 82 Ill. 2d 234, this court has, at this term, rejected this reading of *Van De Rostyne* and held that *Van De Rostyne* and section 114—12(c) of the Code of Criminal Procedure of 1963 do not limit the State's right to appeal from pretrial suppression orders. Inasmuch as the appeal before us was taken from an order entered during trial, further discussion of the appealability of pretrial suppression orders is unnecessary.

At common law, a claim that evidence was obtained by means of an illegal search and seizure had to be raised before trial by means of a motion to suppress or to return the evidence. This requirement arose from a consideration of judicial economy; the court should not be required to interrupt a trial in order to determine the collateral issue of the manner in which the evidence was obtained. (*People v. Braden* (1966), 34 Ill. 2d 516, 520; *People v. Dalpe* (1939), 371 Ill. 607, 611; *People v. Drury* (1929), 335 Ill. 539, 557; *People v. Brocamp* (1923), 307 Ill. 448, 454.) (See 23A C.J.S. *Criminal Law* sec. 1060, at 11 (1961).) By virtue of section 114—12(c) (Ill. Rev. Stat. 1977, ch. 38, par. 114—12(c)), the common law rule was relaxed; the court may, in its discretion, conduct a hearing on a motion to suppress even though the motion is filed after trial has begun, providing that it is alleged that the evidence was illegally seized. Thus, the prohibition against filing a motion to suppress during trial has been relaxed so as not to prevail over the constitutional right to be free from unreasonable searches and seizures. (See generally 23A C.J.S. *Criminal Law* sec. 1060, at 11 (1961).) The

Van De Rostyne court correctly held, therefore, that section 114—12(c) empowers the trial court to entertain the merits of a motion filed during the trial, and the State may appeal from a suppression order then entered only where the defendant seeks the suppression of illegally obtained evidence. We will later address the question of whether the court's authority to enter an order on a motion to suppress lawfully obtained evidence filed during trial can be reviewed.

Article VI, section 6, of our constitution grants this court the authority to provide for appeals from other than final orders. We must, therefore, hold invalid any construction of section 114—12(c) which holds that that section authorizes the State to appeal from an order entered during trial suppressing evidence. The State's right to appeal stems from our Rule 604(a) and not from any statutory provision. The legislative grant of authority to file a motion, however, would not unduly infringe upon the inherent rulemaking authority of the judiciary. (See *People v. Cox* (1980), 82 Ill. 2d 268.) Thus, we view section 114—12(c) as authorizing, to a limited extent, the defendant to make a motion to suppress after the trial has commenced. As noted above, this section has relaxed the common law rule requiring such motions to be made before trial. The defendant should not be permitted to preclude the State's right to appeal by delaying the making of the motion to suppress. Therefore, the State's right to appeal under our Rule 604(a) should be as broad as the defendant's right to file motions to suppress under section 114—12(c), and the suggested procedure for interrupting the trial for the appeal from an order allowing such a motion, as outlined in that section, is appropriate. In other jurisdictions, the broadening of the prosecution's right to appeal has generally been from pretrial suppression orders and not from suppression orders entered after the trial has commenced. In fact, the broadening of the right

of the defendant to make such motions has followed this pattern. See ABA Standards, Criminal Appeals sec. 1.4 (prosecution appeals) & Commentary, at 39-40 (1970); 8 J. Moore, Federal Practice par. 12.05[2], at 12–32 through 12–34 (2d ed. 1980); 18 U.S.C. sec. 3731 (1976).

Since the right of a defendant to file motions to suppress after the trial has commenced is limited by the provisions of section 114–12(c), the State's right to appeal from suppression orders during trial is limited to orders entered allowing these motions. However, some review must be given the prosecution of orders entered granting motions to suppress not authorized under section 114–12(c) which should have been made prior to trial. If the reviewing court determines that the motion was not within the ambit of section 114–12(c) and that the court wrongfully considered it during the trial, the State must be permitted a review of the authority of the court to enter the suppression order, even if it did not involve illegally seized evidence and section 114–12(c) of the Code of Criminal Procedure of 1963. The review would not, in such a case, be of the merits of the court's ruling but rather would concern the trial court's authority to entertain the motion. This right to review the court's authority to entertain the motion is based on two policy considerations. First, the State is not permitted an appeal from a judgment of acquittal in a criminal case. Thus, no review would be had of suppression rulings not falling within section 114–12(c). Therefore, such rulings would result in inconsistent holdings in the suppression area. Second, it would be manifestly unfair for the State's case to be substantially weakened due to the erroneous entry of suppression orders during trial. The right of such review, however, does not extend to rulings which do no more than exclude evidence made during trial but must be limited to rulings which substantially impair the State's

ability to prosecute the case as shown by the certificate of the prosecutor following the rationale of our holding in *People v. Young* (1980), 82 Ill. 2d 234.

We comment finally as to the appropriate remedy to be employed where the reviewing court has determined that the trial court entertained and allowed a motion to suppress that is not authorized by section 114–12(c). The order granting the motion to suppress should be vacated and the cause should be remanded for a continuation of the trial. This cannot be done, however, in violation of the proscription against double jeopardy. (See *People v. Alfano* (1980), 78 Ill. 2d 434, 445-46.) In *Alfano* the trial was not merely interrupted as provided in section 114–12(c), but this court found that the order of the trial court was in fact a judgment of acquittal from which no appeal could be taken by the State.

In our case the court, during trial, erroneously entertained a defendant's motion to suppress and allowed the same and declared a mistrial so that an appeal could be taken from the order. The defendant should not be permitted to benefit from the declaration of a mistrial which resulted from his untimely motion to suppress. Although the trial court may have abused its discretion in entering an order suppressing the evidence and declaring a mistrial, this action was triggered by the defendant, who may, therefore, be tried anew without violating the proscription against double jeopardy. See *United States v. Jorn* (1971), 400 U.S. 470, 27 L. Ed. 2d 543, 91 S. Ct. 547; *People ex rel. Mosley v. Carey* (1979), 74 Ill. 2d 527.

We hold, therefore, that the trial court erroneously considered the merits of defendant's motion. The motion was filed and the order was entered after the jury was sworn. The trial had, therefore, commenced and jeopardy had attached. (*People v. Van De Rostyne* (1976), 63 Ill. 2d 364, 369.) Since the motion was filed during trial, it

could be entertained under section 114—12(c) only if it alleged that the evidence sought to be suppressed was illegally obtained. (Ill. Rev. Stat. 1977, ch. 38, par. 114—12(c).) Defendant does not allege that the evidence was illegally seized. He challenges only the propriety of the State's use of fingerprint evidence which was unavailable for defendant's inspection due to the police department's failure to preserve the glass and to produce the physical evidence pursuant to a pretrial discovery order. By interrupting the trial to determine whether the State should have produced the glass, the trial court dealt with an issue collateral to the determination of defendant's guilt or innocence. Interruption of a trial for the determination of a motion to suppress based on a collateral issue other than as authorized by section 114—12(c) is impermissible. Without considering the correctness of the court's ruling, we find that the trial court erred in entertaining defendant's motion.

Some confusion in this general area has been engendered by the increased use of "*in limine*" motions. Generally, such motions relate to evidentiary matters and simply seek a ruling of the court prior to the time that an issue arises in front of a jury. The term "*in limine*" itself is not a word of art insofar as the content of a motion so labeled is concerned. The term simply means "[o]n or at the threshold; at the very beginning; preliminarily." (Black's Law Dictionary 896 (rev. 4th ed. 1968).) In our case, although the motion which the court allowed was called a motion *in limine*, the gist of the motion was to suppress the evidence of fingerprints for the failure to comply with discovery orders. The motion, although designated an *in limine* motion, should not have been made at the beginning of the trial, but should have been made before the jury was sworn. Accordingly, the judgment of the appellate court and the

order of the circuit court are vacated and the cause is remanded to the circuit court of Peoria County for trial.

Vacated and remanded.

MR. CHIEF JUSTICE GOLDENHERSH, dissenting:

I dissent. In my opinion, fundamental fairness requires that the defendant's motion be treated as a pretrial motion to suppress. The record shows that the People failed to comply with an order to produce the glass from which the latent fingerprint was taken. The circuit court was not advised until the day of trial that it was possible that the glass would be unavailable, and it was at that time that the court indicated that failure to produce the glass would result in the suppression of fingerprint evidence at the trial. The defendant did not waive his motion at that point; it was at the suggestion of the court that the parties proceeded with the case without a definitive ruling on defendant's motion. To treat the defendant's motion as a motion filed after the trial was commenced, under the circumstances shown here, is to elevate form over substance.

I would, as did the appellate court, treat defendant's motion as a timely filed motion to suppress the evidence and would, for the reasons stated in its opinion, affirm the appellate court's judgment.

CLARK and MORAN, JJ., join in this dissent.

Supreme Court, U.S.
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No. 84-137

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SUSAN E. DAVIDSON,
Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

Appeal From The Supreme Court of Illinois

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

	Page
Table of Authorities	i
Appellant's Reply Brief	1
The Instant Appeal is Timely and Should Not be Dismissed	1
The State Should Not be Permitted a Second Attempt to Convict the Defendant Where it Voluntarily Chose to Terminate Her First Trial	4
Conclusion	9

TABLE OF AUTHORITIES

	Page
Cases:	
Great Western Tel. Co. v. Burnham (1896) 162 U.S. 339, 16 S. Ct. 850	2
Minneapolis, St. P. and S.S.M. Ry. Co. v. Rock (1929)	2
People v. Davidson (1983) 116 Ill. App. 3d 164, 71 Ill. Dec. 824, 451 N.E. 2d 978	5
People v. Flatt (1980) 82 Ill. 2d 250, 412 N.E. 2d 509	5
People v. Johnson (1983) 113 Ill. App. 3d 367, 69 Ill. Dec. 285, 447 N.E. 2d 502	5
People v. Rogers (1984) ___ Ill. App. 3d ___, 79 Ill. Dec. 73, 463 N.E. 2d 211	5
Reece v. Georgia (1955) 350 U.S. 85, 76 S. Ct. 167	2
Richardson v. United States (1984) ___ U.S. ___, 104 S. Ct. 3081, ___ L. Ed. 2d ___	3

United States v. Appawoo (10th Cir. 1977) 553 F. 2d 1242 ..... 6, 7

United States v. Moore (C.A.C.D. 1979) 613 F. 2d 1029 6, 7

United States v. Scott (1978) 437 U.S. 82, 98 S.Ct. 2187, 57 L. Ed. 2d 65 7

Urie v. Thompson (1949) 337 U.S. 163, 69 S. Ct. 1018 .. 2

Virginian Railway v. Muellens (1926) 271 U.S. 220, 46 S. Ct. 526 2

Constitutional Provisions and Statutes:

Illinois Revised Statutes, Chapter 110A, Section 604 (a)(1) 4, 5, 6,8

Illinois Revised Statutes, Chapter 110A, Section 604(f) . 2, 3

18 United States Code, Section 3731 4

18 United States Code, Section 1623(d) 6

28 United States Code, Section 1257(2) 1

28 United States Code, Section 1257(3) 1

28 United States Code, Section 1291 3

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I

THE INSTANT APPEAL IS TIMELY AND SHOULD NOT BE DISMISSED

The State in its Motion to Dismiss Appellant's appeal (pages 2-7) asserts that Appellant's notice of appeal to the United States Supreme Court was not timely filed. The State claims that Appellant had an Order appealable under 28 *United States Code,* §1257(2) or (3), at the conclusion of her first state court appeal on October 4, 1983, but that since Appellant did not pursue such appeal at that time she may not now do so.

The State's assertions are in error for several reasons:

1. The double jeopardy issue now advanced would have been untimely and not ripe for review immediately following Appellant's first state court appeal for the reason that at that time no effort had been made to bring her to trial a second time. Had an appeal to the United States Supreme Court been filed following October 4, 1983, the State could properly have sought dismissal because the question of double jeopardy was then premature.

2. Illinois state law (*Illinois Revised Statutes,* Chapter 110a, §604(f)) provided for further state review of Appellant's double jeopardy claim following Appellant's first state court appeal. Exhaustion of this state remedy was required before appeal in the United States Supreme Court. *Minneapolis, St. P. and S.S.M. Ry. Co. v. Rock* (1929), 279 U.S. 410, 49 S. Ct. 363; *Virginian Railway v. Muellens* (1926) 271 U.S. 220, 46 S. Ct. 526.

Had Appellant filed her appeal to the United States Supreme Court following October 4, 1983, such appeal could have been dismissed for failure to exhaust all available state remedies.

3. The fact that the highest court of the state in a second appeal refuses to consider the federal issue decided in a first appeal does not deprive the United States Supreme Court of jurisdiction to review the second judgment. *Reece v. Georgia (1955), 350 U.S. 85, 76 S. Ct. 167; Urie v. Thompson* (1949), 337 U.S. 163, 69 S. Ct. 1018; *Great Western Tel. Co. v. Burnham* (1896), 162 U.S. 339, 16 S. Ct. 850. Such is the case here.

4. Appellant waited to prosecute her appeal to the United States Supreme Court until she had exhausted all available state remedies and until she had an actual controversy ripe for review. The exhaustion of her second appeal available under state law was a prerequisite and a necessary requirement preparatory to appeal to the United States Supreme Court.

5. The procedurally analogous case of *Richardson v. United States* (1984), ____ U.S. ____, 104 S. Ct. 3081, ____ L. Ed. 2d ____, illustrates the timeliness of the instant appeal. In *Richardson,* the defendant was acquitted of one of three counts, the remaining two counts resulting in a hung jury. No appeal was taken following the first trial. The prosecution sought to bring defendant to trial a second time on the counts which had resulted in a hung jury. The defendant then moved to bar retrial of the remaining counts based on claims of double jeopardy. The District Court denied defendant's motion and the Court of Appeals dismissed the defendant's appeal of such denial for lack of jurisdiction. The United States Supreme Court, on certiorari, reversed the adverse jurisdictional determination and held that defendant presented a "colorable" double jeopardy claim which was appealable before his second trial.

In the instant case, Appellant's double jeopardy claim is no less a colorable one than that of the defendant in *Richardson* merely because an appeal by the State intervened between Appellant's first and second trials. The first state appeal is not a bar to the instant appeal, since it was brought by the State, was a procedural extension of the improper termination of Appellant's first trial, and is a part of the basis of the present double jeopardy claim.

Appellant's double jeopardy claim is likewise appealable before her second trial. In this respect, *Illinois Revised Statutes,* Chapter 110a, §604(f) and 28 *United States Code,* §1291, as interpreted, parallel each other. Here the claim of double jeopardy directly stems from the state's improper termination of Appellant's first trial to appeal evidentiary rulings.

The instant appeal, therefore, is timely and should not be dismissed.

II

THE STATE SHOULD NOT BE PERMITTED A SECOND ATTEMPT TO CONVICT THE DEFENDANT WHERE IT VOLUNTARILY CHOSE TO TERMINATE HER FIRST TRIAL.

The State claims Appellant's appeal presents no substantial question for decision because Illinois Supreme Court Rule 604(a)(1) purportedly goes no further in permitting mid-trial appeal than does the existing federal rule. Existing federal case law interpreting the federal rule on mid-trial appeal as constitutional under the Double Jeopardy Clause is therefore advanced by the State in support of the constitutionality of the "similar" Illinois rule.

Such analogy by the State is in error because the Illinois Rule is wholly dissimilar to the present federal rule on the double jeopardy point here at issue. Indeed, the Illinois Rule goes far beyond what has been held constitutionally permissible in interpretation of this prevailing federal rule.

The State claims (Motion to Dismiss, page 10) that 18 *United States Code,* §3731 constitutionally permits mid-trial State appeals of suppression rulings in criminal cases over a defendant's objection after jeopardy has attached, and that therefore the "analogous" Illinois rule is similarly permissible under the Double Jeopardy Clause. Such assertion misrepresents §3731 and the cases cited by Appellee in support of this interpretation.

Title 18, *United States Code,* §3731, provides:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence...in a criminal proceeding, not made after the Defendant has been put in jeopardy...

Illinois Supreme Court Rule 604(a)(1), on the other hand, specifically permits state appeals of suppression rulings in

criminal cases after the defendant has been placed in jeopardy. Contrary to the State's assertion (Motion to Dismiss, page 8-9), Rule 604 both on its face and as construed by the Illinois Supreme Court in *People v. Flatt* (1980) 82 Ill. 2d 250, 412 N.E. 2d 509, and as here applied, goes far beyond that previously determined permissible under the Double Jeopardy Clause by permitting mid-trial appeal of "suppression" rulings.

The State asserts the supposed narrowness of the Illinois rule in support of its constitutionality (Motion to Dismiss, page 9), arguing that it is only "suppression" rulings which are appealable under the rule, as distinguished from mere evidentiary rulings (Motion to Dismiss, page 6a). Yet the Supreme Court of Illinois in *Flatt* (Motion to Dismiss, page 6a, 8a) itself recognized "the difficulty involved in defining that which constitutes an order of suppression". Indeed several conflicting definitions of that which constitutes a suppression have developed in Illinois. Compare *People v. Davidson* (1983) 116 Ill. App. 3d 164, 71 Ill. Dec. 824, 451 N.E. 2d 978, with *People v. Johnson* (1983) 113 Ill. App. 3d 367, 69 Ill. Dec. 285, 447 N.E. 2d 502, and *People v. Rogers* (1984) ____ Ill. App. 3d ____, 79 Ill. Dec. 73, 463 N.E. 2d 211.

Whether called a suppression or an exclusion of evidence, Illinois Supreme Court Rule 604 (a)(1) in any event permits a prosecutor in a criminal case after jeopardy has attached and over a defendant's specific objections to the contrary, to terminate a jury trial and appeal an evidentiary ruling which prevented the introduction of some kind of evidence before the jury and then to retry the same defendant for the same offense before a different jury.

Whether the adverse ruling appealed constitutes a "suppression" or an "exclusion" is a distinction without a constitutional difference under the Double Jeopardy Clause. The fact remains that the prosecutor himself voluntarily chose to terminate Appellant's trial after jeopardy had attached, that Appellant ob-

jected to the termination, and that the final result sought by the State is to commence Appellant's trial anew for the same offense before a different trier of fact. Appellant respectfully submits therefore that Illinois Supreme Court Rule 604 (a)(1) offends the Double Jeopardy Clause regardless of whether it is only suppressions which are appealable by the State mid-trial.

If such loosely defined "suppressions" are constitutionally appealable mid-trial, there is no constitutional bar to the mid-trial appeal of rulings heretofore known as "exclusions", leaving the prosecutor free to appeal mid-trial, notwithstanding the attachment of jeopardy, any adverse evidentiary ruling which he is willing to certify is injurious to his chances of conviction.

In support of its claim that mid-trial appeals of suppression rulings after jeopardy has attached are constitutionally permitted by federal courts, and therefore by analogy are constitutionally permitted under the Illinois rule, the State cites *United States v. Moore* (C.A.C.D. 1979) 613 F. 2d 1029 and *United States v. Appawoo* (10th Cir. 1977) 553 F. 2d 1242. These cases do not at all support the State's position, however, since neither were mid-trial appeals. Instead, both were appeals of cases which had been dismissed on motion of the defendant prior to verdict. In each case at the time of the appeal the case itself was concluded.

In *Moore,* the defendant moved for dismissal of a four-count perjury indictment after jeopardy had attached, claiming that the prosecution was barred by the recantation provision of 18 *United States Code,* §1623(d). The court erroneously allowed defendant's motion and dismissed the case. In *Appawoo,* the defendant moved to dismiss before trial but the trial court did not consider the motion until the jury was impaneled and sworn and jeopardy had attached. At the conclusion of the government's case, the trial court "acquitted" the defendant by granting his pre-trial motion to dismiss.

Similar and particularly illustrative is *United States v. Scott* (1978), 437 U.S. 82, 98 S. Ct. 2187, 57 L. Ed. 2d 65. In *Scott* the trial court dismissed a two-count indictment at the close of the government's case. The defendant had moved prior to trial for dismissal on the grounds of pre-indictment delay, but the court did not rule until the government rested. The government's appeal was dismissed by the Court of Appeals on double jeopardy grounds and the United States Supreme Court reversed, holding that where a defendant himself successfully seeks to have his trial terminated prior to a determination of guilt or innocence and on a ground unrelated to that determination, the government may appeal from such termination without offending the Double Jeopardy Clause.

The profound difference between the instant case and the situations in *Moore, Appawoo* and *Scott,* is that in the instant case, it was the State which terminated Appellant's trial after jeopardy had attached and over Appellant's repeated objections, whereas in the cases cited by the State, it was the defendant himself who moved to terminate his own trial prior to a determination of guilt or innocence. At the trial in the instant case, Appellant argued in the strongest terms that her trial should continue and that its termination by the State was improper. Conversely, in *Moore, Appawoo* and *Scott* it was the defendant who voluntarily sought termination of the trial prior to verdict upon a ground unrelated to guilt or innocence. No federal case has been found under which re-trial was constitutionally permitted notwithstanding double jeopardy where the State on a ground unrelated to guilt or innocence terminated the trial over defendant's objection after jeopardy attached so as to appeal a suppression ruling.

A further distinction between the cited federal case law and the instant case is that *Moore, Appawoo* and *Scott* had all been completely terminated prior to appeal. No further trial court evidentiary proceedings were contemplated, as the dismissals were intended to conclude each case with finality. The termina-

tion of the Appellant's case by the State, on the other hand, was never intended to end further trial court evidentiary proceedings. It was rather designed to interrupt her trial to permit the State to obtain an appellate ruling in aid of her subsequent prosecution for the same offenses before a different jury. Appellant's second and subsequent prosecution will not be a continuation of the first trial but rather will be a completely new trial before a completely new trier of fact.

The State here does not deny that Appellant's trial was terminated by the State itself over Appellant's specific objections after jeopardy had attached. It argues instead that the court's "erroneous" evidentiary rulings at trial forced the State to terminate the trial to avoid loss of the trial. The State claims that the making of such evidentiary objections by Appellant is constitutionally analogous for double jeopardy purposes to a motion by Appellant to terminate the trial.

Respectfully, the Appellant disagrees with such analysis and conclusion. In the instant case, the State voluntarily elected to seek termination of the trial over the Appellant's specific and repeated objections, knowing full well that jeopardy had attached. Here it is not the defendant, as in the *Scott* case, but rather the State which is responsible for the second prosecution.

The State, in effect, seeks an exception to the Double Jeopardy Clause under which a defendant's evidentiary objection is tantamount to an election to forego his right to have his guilt or innocence determined by the first trier of fact. This court should not adopt such a rule.

While the Double Jeopardy Clause does not relieve a defendant from the consequences of his voluntary choice to terminate trial prior to verdict, it should protect a defendant from re-trial where the State rather than the defendant improperly terminated the original trial. Any statute, such as Illinois Supreme Court Rule 604(a)(1), which permits such improper terminations as a matter of course should not be permitted to stand.

The State here voluntarily chose to terminate Appellant's trial and it should not now be permitted a second attempt at conviction. Nor should a state court rule permitting such multiple trials be permitted to stand. A substantial question is therefore presented and this appeal should not be dismissed.

CONCLUSION

This appeal is timely and presents a substantial and colorable double jeopardy claim. Therefore the appeal should not be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States of America, hereby certifies that a true and correct copy of the above, foregoing and attached Appellant's Reply Brief was duly served upon the attorney of record of all parties to the above entitled cause required to be served, by enclosing the same in an envelope duly addressed to such attorney at his business address as disclosed by the pleadings of record herein, with first class postage fully prepaid, and by depositing said envelope into a United States Post Office mailbox located in the Village of East Alton, State of Illinois, on the 11th day of Sept, A.D., 1984.

SUSAN E. DAVIDSON,
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STATE OF ILLINOIS

SS.

COUNTY OF MADISON

AFFIDAVIT

Donald E. Groshong, being first duly sworn according to law, on oath deposes and says that he has read the above, foregoing and attached Certificate of Service and that he is familiar with the contents thereof and the matters contained therein, and that they are true and correct to the best of his knowledge and belief.

Donald E. Groshong, Affiant

SUBSCRIBED and SWORN to before me this 11th day of September, 1984.

Notary Public

My Commission Expires: 7/29/85